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No. 08-721

Supreme Court, U.S.
FILED
NOV 26 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREGG ABBOTT, ATTORNEY GENERAL OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Nearly all States have retaliatory tax statutes that impose additional taxes on out-of-state insurance companies whenever the insurance company's home State imposes higher insurance taxes than the retaliating State does. Texas recently reinterpreted its retaliatory tax statute so that 85% of the premium taxes it collects from out-of-state title insurers are ignored in comparing tax burdens, dramatically increasing the amount of retaliatory tax that out-of-state insurance companies must pay. Four justices of the Texas Supreme Court concluded that the State's new interpretation violates the Equal Protection Clause under this Court's precedents. The question presented is:

Whether Texas's new interpretation of its retaliatory tax violates the Equal Protection Clause.

PARTIES TO THE PROCEEDINGS BELOW

Carole Keeton Strayhorn, former Comptroller of Public Accounts of the State of Texas, was a defendant in the district court and an appellee in the court of appeals. All other parties to the proceedings are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner First American Title Insurance Company is a wholly owned subsidiary of The First American Corporation, a publicly traded company. The First American Corporation has no parent corporation, and no publicly traded company owns 10% or more of its stock.

Petitioner Old Republic National Title Insurance Company is a wholly owned subsidiary of Old Republic International Corporation, a publicly traded company. Old Republic International Corporation has no parent corporation, and no publicly traded company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners First American Title Insurance Company and Old Republic National Title Insurance Company respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra*, 1a-35a) is published at 258 S.W.3d 627 (Tex. 2008). The opinion of the Court of Appeals for the Third Appellate District of Texas (App., *infra*, 36a-60a) is published at 169 S.W.3d 298 (Tex. App. 2005). The orders and judgments of the District Court of Travis County, Texas (App., *infra*, 61a-64a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Texas was entered on May 16, 2008. The court denied rehearing on August 29, 2008 (App., *infra*, 65a), and issued a corrected opinion the same day (App., *infra*, 1a-35a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Relevant provisions of the Texas Insurance Code are set forth in the Appendix (App., *infra*, 66a-72a).

INTRODUCTION

This case arises out of Texas's decision to reinterpret its retaliatory tax to increase dramatically the burdens on out-of-state—and only out-of-state—insurance companies. The Texas Supreme Court upheld the State's new interpretation, over the dissent of four justices who concluded that it "makes no sense" and constitutes "blatant and unapologetic discrimination against out-of-state insurers" in violation of the federal Equal Protection Clause. App., *infra*, 34a-35a. Unless corrected, the state court's decision will threaten grave harm to the nationwide insurance industry. Accordingly, this Court should grant review.

STATEMENT

I. BACKGROUND

A. Retaliatory Taxes

For more than a century, States have imposed retaliatory taxes designed to "equalize the tax burdens borne by [domestic] and foreign-based * * * insurance companies." App., *infra*, 1a-2a, 5a. Under a typical regime, retaliatory taxes apply to out-of-state insurance companies whenever the out-of-state insurance company's home State imposes higher insurance taxes than the retaliating State. See *id.* at 4a. For example, if Maryland imposes premium taxes of 2% on insurance companies while Mississippi imposes premium taxes of 3%, an insurer from Mississippi doing business in Maryland would have to pay to Maryland not only the 2% premium tax that all insurers pay, but also an additional 1% retaliatory tax measured by the difference between the two States' tax rates. In theory, that additional tax would encourage Mississippi to lower its premium taxes to Maryland's rate, thus fostering more modest and uniform taxation of insurance companies across the country. See *id.* at 4a-5a; L. Russ, *Construction, Application, and Operation of State "Retaliatory" Statutes*, 30 A.L.R. 4th 873 (1984).

In *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), this Court upheld California's retaliatory tax—a typical retaliatory tax statute—against a claim that it unfairly discriminated against out-of-state insurers. The Court stated that, although Congress removed all Commerce Clause limitations on state insurance regulation by passing the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945), that Act did not "alter[] constitutional standards other than those derived from the Commerce Clause," and thus "the Equal Protection Clause remains as a possible ground for invalidation of the California tax." 451

U.S. at 653, 656 & n.6. The Court held, however, that the tax did not violate equal protection. *Id.* at 674. The Court saw a legitimate purpose of "promot[ing] the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes." *Id.* at 668-671. The Court also found it "reasonable for California's lawmakers to believe that use of the challenged classification would promote that purpose." *Id.* at 671-674. Justice Stevens and Justice Blackmun dissented, arguing that the tax constituted "flagrant discrimination" against non-resident insurers. *Id.* at 674-675.[1]

B. Texas's Taxation of Title Insurers

1. Title insurance indemnifies the insured against losses from defects in, or encumbrances upon, title to real property. See 1 J. Palomar, *Title Insurance Law* § 1:8, at 1-21 (rev. 2008). In addition to agreeing to compensate the insured if such defects emerge, title insurers seek to eliminate the risk of title defects in advance by searching real property records before a transaction closes. See *id.* § 1:15, at 1-36. That "risk-elimination" component is, in fact, "the main focus of title insurance, with the major portion of the title insurance premium going toward its cost." *Id.* § 1:15, at 1-38; see also Am. Land Title Ass'n, *Title Insurance: A Comprehensive Overview* 2, http://www.alta.org/about/TitleInsuranceOverview.pdf.

Title insurance companies often do business through "title agents"—distinct business entities that are contractually authorized to sell and issue policies on the insurance company's behalf. See App., *infra*, 2a; Tex. Ins. Code § 2501.003(13). Typically, the title agent performs the title search and other closing functions, while the insurance company underwrites the policy and remains

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[1] The Solicitor General had also filed a brief urging the Court to strike down the tax. See U.S. Br. in No. 79-1423, 1980 WL 339814, at *8 (July 1980).

responsible for paying any claims. See Tex. Ins. Code § 2501.003(12)-(14).

Title insurance companies and their agents divide the premium revenue collected by the agents for the policies they sell. In some States, that division of premium revenue is set by contract between the insurance company and its agents. See, *e.g.*, Cal. Ins. Code § 12412. In other States such as Texas, state regulators prescribe a fixed division of premium. See App., *infra*, 2a-3a. In the relevant period, the Texas Department of Insurance prescribed an 85/15 split—title agents kept 85% of the premium revenue and the insurance company kept the other 15%. *Id.* at 3a. The total premium is often referred to as the "gross" premium, and the insurance company's share as the "net" premium.

2. Texas, like other States, imposes premium taxes on title insurance premium revenue. App., *infra*, 1a. The premium tax statute in effect at the relevant time provided that "[e]ach *title insurance company* receiving premiums from the business of title insurance shall pay to the comptroller a tax on those premiums" at an annual rate of 1.35%. Tex. Ins. Code art. 9.59, §§ 1, 4 (2004) (emphasis added).[2] The statute clarified that "[t]he premium tax is levied on all amounts defined to be premium in this Chapter, *whether paid to the title insurance company or retained by the title insurance agent*, such tax being in lieu of the tax on the premium retained by the agent," and recited that the State "facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium

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[2] The statute has been recodified and now appears, reworded, at Tex. Ins. Code §§ 223.001-.011. The recodifying act states that it is "intended as a recodification only" and that "no substantive change in law is intended." 2003 Tex. Sess. Law Serv. ch. 1274, § 27.

tax due on the agent's portion of the premium and remits it to the State." *Id.* § 8(b) (emphasis added). Thus, the premium tax is imposed on the total *gross* amount of the premium (*i.e.*, both the 15% share that the insurance company receives and the 85% share that the title agent retains), and it is collected from the insurance company, not the agent. See App., *infra*, 3a-4a. The premium tax applies equally to Texas-based insurance companies and out-of-state insurance companies selling policies in Texas. See *id.* at 4a.

In addition to the premium tax, Texas also imposes a retaliatory tax on out-of-state insurance companies. Like other States, Texas traditionally calculated that tax by comparing the tax burdens that Texas imposes on out-of-state insurers with the tax burdens the other State imposes on Texas insurers. At the time relevant to this dispute, Texas's statute provided:

> Whenever by the laws of any other state or territory of the United States any taxes * * * are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes * * * directly imposed upon a similar insurance company of such other state or territory doing business in this State, the comptroller shall impose upon and collect from any similar company of such state or territory * * * the same taxes * * * .

Tex. Ins. Code art. 21.46, § 1(a) (2004).[3]

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[3] The current provisions appear at Tex. Ins. Code §§ 281.001-.008. As noted above, the recodifying act states that there was no substantive change in the law. See n.2, *supra*.

II. PROCEEDINGS BELOW

A. The State's New Interpretation of Its Retaliatory Tax

Traditionally, out-of-state title insurance companies counted the entire amount of premium tax they remitted to Texas when computing their Texas retaliatory tax. See App., *infra*, 5a. For example, a Minnesota title insurance company doing business in Texas would calculate its retaliatory tax by comparing Minnesota's 2% premium tax rate with Texas's 1.35% premium tax rate. Compare Minn. Stat. § 297I.05(1) with Tex. Ins. Code art. 9.59, § 4 (2004). The retaliatory tax would be the difference between those two rates—0.65%. See Tex. Ins. Code art. 21.46, § 1(a) (2004). When added to the 1.35% Texas premium tax, the Minnesota insurance company would pay a total of 2%—the same amount a Texas insurer would pay in Minnesota. If another State had a premium tax rate that was equal to or less than Texas's rate, an insurer from that State would not pay any retaliatory tax in Texas at all.

As the Texas Supreme Court explained, "[t]his system * * * operated with minimal change until a few years ago when the [Texas] Comptroller reinterpreted the retaliatory tax statute in a way that sharply increased the tax liability of certain non-Texas title insurers." App., *infra*, 2a. In 1996, the Comptroller adopted a "new rule" that "resulted in a new method of calculating the retaliatory tax." *Id.* at 5a. "The Comptroller reasoned that because title insurers keep only 15% of premiums collected on agent-issued policies * * * foreign title insurers could count only that 15% when figuring the amount of retaliatory tax owed." *Ibid.*

That change dramatically altered the calculation of retaliatory tax in Texas. Formerly, an out-of-state insurer compared the total tax it remitted to Texas to the total

tax an insurer would pay in its home State. Now, the out-of-state insurer has to exclude from that comparison 85% of the premium tax that Texas collects from the insurer. "The result of this new math: the foreign insurers' premium tax liability dropped compared with what other states imposed on Texas insurers, thus substantially increasing the foreign insurers' retaliatory tax liability." App., *infra*, 5a.

The State's new approach substantially increases the retaliatory taxes imposed on out-of-state insurers. For example, a Minnesota title insurance company doing business in Texas would continue to remit 1.35% in premium taxes. In calculating its retaliatory tax, however, it would be deemed to have paid only 15% of that amount (*i.e.*, 0.203%). The retaliatory tax would thus be based on the difference between Minnesota's 2% rate and *15% of Texas's 1.35%* rate. See App., *infra*, 27a-28a. The insurer would thus pay a retaliatory tax of 1.797% (*i.e.*, 2% – 0.203%), which—when combined with the 1.35% premium tax—would yield total taxes of 3.147%. See *ibid.* That 1.797% retaliatory tax is almost *three times* the amount the insurance company would have paid under the Comptroller's longstanding prior approach (0.65%). And the total amount of tax the insurance company now remits to Texas (3.147%) is substantially higher than either the amount Texas collects from its own domestic insurers (1.35%) or the amount that Minnesota collects from either Texas or Minnesota insurers (2%).

Texas's new approach results in retaliatory taxes even where the other State imposes *lower* premium taxes than Texas does. See App., *infra*, 28a. Insurers from a State with a 1% premium tax, for example, would not have paid any retaliatory tax under Texas's old regime, because that 1% rate is lower than Texas's 1.35% rate. Under the State's new interpretation, however, the insurers *would*

have to pay, because 1% is higher than 15% of Texas's 1.35% rate. See *ibid.*

B. Proceedings in the District Court and Court of Appeals

First American Title Insurance Company and Old Republic National Title Insurance Company are out-of-state title insurance companies that do business in Texas. App., *infra*, 2a. First American is domiciled in California, and Old Republic is domiciled in Minnesota. *Ibid.* As a result of the Comptroller's new interpretation, First American paid an additional $1.4 million in retaliatory tax for tax years 2001 and 2002, and Old Republic paid an additional $219,000 for tax year 2002. *Id.* at 6a. After paying those amounts under protest, both companies sued for refunds, claiming that the Comptroller had misinterpreted the Texas Insurance Code and that the new interpretation violated the federal and state Equal Protection Clauses. See *ibid.*; First Am. Compl. ¶ 26; Old Rep. Compl. ¶ 28.

The district court rejected both suits on summary judgment. See App., *infra*, 61a-64a. The insurance companies appealed to the Court of Appeals for the Third Appellate District, and the suits were consolidated. *Id.* at 37a n.1. Petitioners renewed their statutory and constitutional arguments, including their federal equal protection claim. See Tex. C.A. Br. 30-37. The court of appeals affirmed. App., *infra*, 36a-60a.

C. Proceedings in the Supreme Court of Texas

The Supreme Court of Texas granted discretionary review. Petitioners again urged that the Comptroller had misconstrued Texas law and violated the state and federal Equal Protection Clauses. See Tex. Sup. Ct. Br. 14-23. On May 16, 2008, the court affirmed by a divided 5-4 vote. App., *infra*, 1a-35a.

1. The court first rejected petitioners' argument that the Comptroller had misconstrued Texas law. It acknowledged that the State had departed from its longstanding interpretation. App., *infra*, 2a. But it opined that the new interpretation was "reasonable and in harmony with the statute's plain meaning." *Id.* at 10a.

The court then rejected petitioners' claims under the federal Equal Protection Clause (as well as the state Equal Protection Clause, which it construed to be coextensive). App., *infra*, 20a. As the court recognized, this Court's decision in *Western & Southern* requires two inquiries: (1) whether the tax has a legitimate purpose, and (2) whether the tax can reasonably be expected to promote that purpose. *Ibid.*

Petitioners urged that the State's new interpretation does not serve the legitimate purpose of deterring excessive taxation in other States because "foreign states would have to reduce premium tax rates by as much as 80% to match the premium tax burden imposed on insurers by Texas law." App., *infra*, 21a. The court did not dispute that that was the result of the State's new interpretation, but perceived a legitimate purpose nonetheless, citing several considerations. First, "[t]he Comptroller did not develop this scheme independently as a revenue-raising plan," but was merely implementing "the statutory scheme developed by the Legislature." *Ibid.* Second, the "Comptroller's construction of the retaliatory tax system does not impermissibly discriminate against foreign title insurers" because "[a]ll title insurers operating in Texas, whether domestic or foreign, are subject to the 85/15 premium tax division." *Id.* at 21a-22a. Finally, "foreign title insurers are not taxed merely because they are foreign; they are taxed only if their home states impose higher financial obligations on Texas insurers than Texas imposes on foreign insurers," and the increase in retaliatory taxes under the State's new interpretation

"depends just as much on premium tax rates charged by other states as it does on the Comptroller crediting title insurers with only 15% of the total premium tax payment." *Id.* at 22a. While the State's interpretation "may have unforeseen or unintended results," the court explained, that does not make it unconstitutional. *Ibid.* The interpretation "exerts some downward pressure on foreign tax rates," the court claimed, and thus reflects a "legitimate state purpose of protecting Texas title insurers by pressuring other states to keep their premium taxes low." *Ibid.*

Turning to the second *Western & Southern* prong, the court held that the State rationally could have believed that "reducing the premium tax burdens Texas imposes on title insurers operating here would encourage other states to impose lower financial obligations on Texas title insurers operating elsewhere." App., *infra*, 22a. The court rejected the argument that there was "'no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes.'" *Id.* at 22a-23a. In the court's view, the 85% of the premium tax now deemed paid by the agent was irrelevant: "[T]he correct comparison," it asserted, "is between the taxes imposed on insurance companies, not insurance premiums or insurance industries." *Id.* at 23a. The court defended that conclusion on the ground that "[t]he equal protection clause guarantees that similarly situated persons—not similarly situated tax schemes or similarly situated industries—be treated similarly." *Ibid.*

2. Justice Hecht dissented, joined by Justices Wainwright, Brister, and Medina. App., *infra*, 24a-35a. The dissent acknowledged that the Texas retaliatory tax, as previously applied, was constitutional under *Western & Southern*. *Id.* at 25a-26a. In the dissent's view, however, the State's "sudden departure from the settled application" of the tax "violates Equal Protection." *Id.* at 26a.

"For decades," the dissent explained, "the retaliatory tax in Texas and other states has been determined by comparing the taxes on total premiums, not just the insurer's share." App., *infra*, 27a. But "the Comptroller now takes the position that 'total' means 100% in every other state and 15% in Texas." *Ibid.* By "artificially reducing the size of Texas' premium tax" by 85% when determining whether to impose a retaliatory tax, the State's new interpretation would result in retaliatory taxes "even when insurers hail from states imposing lower premium taxes than Texas." *Id.* at 28a. The tax would thus "no longer operate[] to discourage excessive taxation in other states." *Ibid.*

While the majority had focused on the insurance company's share of the premium tax to the exclusion of the agent's share, the dissent found it "myopic to view a tax on gross revenue as affecting only some of the participants in the business who must share that revenue." App., *infra*, 33a. "[B]y comparing only the insurer's share of the Texas premium tax to another state's undivided premium tax," the dissent explained, "the Comptroller imposes and collects the retaliatory tax in a different manner and for a different purpose than the other state in imposing and collecting its tax." *Id.* at 34a. That was impermissible because the retaliatory tax statute "clearly requires the Comptroller to make apples-to-apples comparisons." *Id.* at 33a.

The majority's position, the dissent argued, "makes no sense." App., *infra*, 34a. *Western & Southern* found a legitimate interest in deterring other States from enacting excessive taxes. *Ibid.* But the dissent saw "no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive." *Ibid.* The State's legitimate interests were not served by "retaliating whenever another state's industry-wide tax

would exceed Texas' tax on some of the participants, or whenever another state employs a different accounting method for calculating and assessing premium taxes." *Ibid.* The State's new interpretation amounted to "blatant and unapologetic discrimination against out-of-state insurers and parochial protectionism." *Ibid.* Concluding that "[t]he Comptroller's treatment of Texas title insurers doing business in other states and out-of-state title insurers doing business in Texas is as equal as 15 is to 100," the dissent urged that "the Comptroller's position is not permitted by * * * the Fourteenth Amendment." *Id.* at 35a.

3. Petitioners moved for rehearing or clarification. On August 29, 2008, the court denied rehearing but issued a corrected opinion. App., *infra*, 65a.[4]

REASONS FOR GRANTING THE PETITION

As four justices of the Texas Supreme Court correctly concluded, Texas's new interpretation of its retaliatory tax divorces that tax from any legitimate purpose. For years, Texas calculated retaliatory tax by comparing the actual amount an insurance company remitted in Texas to the amount an insurance company would pay in the other State. Then, without any change in the statute or the economics of the transaction, the Comptroller decided that insurance companies "pay" only 15% of the amount they remit. The other 85% is now deemed paid by title agents, and thus excluded from the retaliatory tax calculation. Because Texas alone excludes 85% of the taxes it collects from insurance companies in calculating retaliatory tax, the State's new interpretation effectively

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[4] The corrected version eliminated a portion of one sentence that had erroneously suggested that petitioners did not preserve one aspect of their constitutional claim. It deleted the words "The insurers do not challenge this point, and," which formerly preceded the sentence "We have no trouble concluding that * * * " on page 22a.

compares 100% of taxes elsewhere with 15% of taxes in Texas. The dissent's thorough refutation of the majority's unconvincing analysis upholding that interpretation is incontrovertible: The State's "new math" simply "makes no sense"—it represents "blatant and unapologetic discrimination against out-of-state insurers and parochial protectionism." App., *infra*, 34a.

The Texas Supreme Court's decision warrants review. Retaliatory taxes are ubiquitous. Although this Court upheld the basic concept of a retaliatory tax in *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), those taxes remain fertile ground for litigation where state authorities rely on irrational interpretations to justify arbitrary discrimination against out-of-state insurance companies. Some state courts have invoked the Equal Protection Clause to reject such interpretations; others have allowed them. See pp. 16-20, *infra*. The Texas Supreme Court's decision, however, effectively licenses States to impose retaliatory taxes on out-of-state insurance companies regardless of whether other States impose higher or lower taxes. The predictable result of that decision will be renewed vigor on the part of tax authorities in other States to devise their own clever ploys for raising revenue from out-of-state insurance companies, as well as counter-retaliation designed to defend a State's own insurers (which one State has already indicated it may impose, see p. 24, *infra*). At best, insurance companies will continue to face arbitrary discrimination; at worst, the Texas Supreme Court's decision could herald a retaliatory tax war.

Wholly apart from the issue's importance to the industry, the Texas Supreme Court's decision warrants review because it authorizes blatant, parochial discrimination against non-residents in violation of this Court's precedents. A long line of this Court's cases makes clear that the Equal Protection Clause prohibits arbitrary discrimi-

nation against non-resident insurance companies. The Texas Supreme Court's decision renders those constraints meaningless. As the dissent below explained, there is "no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive." App., *infra*, 34a. The State's "new math" completely strips the retaliatory tax of its equalizing character, and thus its legitimacy and rationality as well.

I. THE TEXAS SUPREME COURT'S DECISION IS A MATTER OF GREAT IMPORTANCE TO THE NATION'S INSURANCE INDUSTRY

The Texas Supreme Court's decision is of vital interest to the insurance industry. Constitutional litigation over retaliatory taxes is routine. And the decision below dramatically alters the legal landscape for those challenges.

A. Retaliatory Taxes Regularly Spawn Constitutional Disputes

The constitutional issues implicated by the Texas Supreme Court's decision arise time and again. All States other than Hawaii have retaliatory taxes. See App., *infra*, 73a-74a (collecting statutes). While the statutes differ in their particulars, they share the same essential feature: They impose taxes on out-of-state insurers whenever the insurer's home State taxes insurers more heavily than the retaliating State does. See *ibid.*

In *Western & Southern*, this Court addressed the constitutionality of California's retaliatory tax—a typical retaliatory tax statute. See 451 U.S. at 650-651. The Court recognized the long pedigree of retaliatory taxes like California's, and perceived a legitimate purpose of "promot[ing] the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes"—in other words, "'put[ting] pressure on the several states to impose the same tax burden on all

insurance companies.'" *Id.* at 668-671. The Court also found it reasonable to believe that the tax would promote that purpose, in part because there was some empirical evidence (albeit mixed) that retaliatory taxes like California's had moderated and equalized tax burdens. See *id.* at 671-674.

In the wake of *Western & Southern*, state courts have repeatedly been called upon to address the constitutionality of retaliatory taxes that go beyond the plain-vanilla tax at issue in *Western & Southern* itself. Disputes are particularly common where tax authorities insist on interpretations that divorce the tax from its traditional legitimate purpose. The Equal Protection Clause plays an important and recurring role in those disputes.

1. Recently, for example, the New Jersey Supreme Court considered a federal constitutional challenge to an interpretation of that State's retaliatory tax in *American Fire & Casualty Co.* v. *New Jersey Division of Taxation*, 912 A.2d 126 (N.J. 2006). New Jersey has a unique "premium tax cap statute" that limits the premium taxes an insurer (foreign or domestic) pays if it does a specified amount of business in the State. *Id.* at 129. The state Division of Taxation, however, had interpreted the retaliatory tax to negate any benefits foreign insurers would receive under the cap. See *id.* at 132. The result was that out-of-state insurers would pay substantial retaliatory taxes, without regard to whether their home State's premium tax rate was higher or lower than New Jersey's stated rate. See *id.* at 137-138.

The New Jersey court of appeals held the Division's interpretation unconstitutional under the Equal Protection Clause. See 868 A.2d 346, 363 (N.J. Super. Ct. App. Div. 2005). Although *Western & Southern* recognized "the promotion of interstate business as a justification for an otherwise suspect or forbidden retaliatory tax," the court explained, the interpretation adopted by the Divi-

sion of Taxation "cannot reasonably be expected to produce these results." *Ibid.* Whereas *Western & Southern* involved "a nationally adopted taxation regime enacted to pressure states into achieving parity in taxation," the Division's aberrant interpretation "creat[ed] an unjustifiable domestic preference" that was "purely and completely discriminatory." *Ibid.*

The New Jersey Supreme Court affirmed, describing the intermediate court's decision as a "well-reasoned opinion." 912 A.2d at 132. The Division's interpretation, the court held, "fail[ed] to promote the retaliatory tax statute's purpose of encouraging 'even-handed treatment' of insurers between states" because it did not make a meaningful comparison of state tax burdens. See *id.* at 137. Even "foreign insurers * * * who hail from states with a *lower* tax rate than New Jersey's stated rate of 2.1% would still pay retaliatory tax" in many cases. *Ibid.* (emphasis added). Foreign insurers could avoid retaliation only if their home States reduced premium tax rates well below New Jersey's stated rate—in one example, to roughly *one-sixth* of New Jersey's stated rate. See *id.* at 137-138. Because it was unlikely that other States would reduce their premium tax rates so dramatically, the court found it "evident that the Director's application of retaliatory tax is not intended to 'apply pressure on other States to maintain low taxes on [New Jersey] insurers,' but rather, is intended to generate revenue." *Id.* at 138 (quoting *Western & Southern*, 451 U.S. at 669-670) (citation omitted). That determination raised "significant constitutional questions" under the Equal Protection Clause, which the court avoided by rejecting the Division's interpretation. *Ibid.*

New York's highest court confronted a similar issue in *United Services Automobile Ass'n* v. *Curiale*, 668 N.E.2d 384 (N.Y. 1996). New York imposes on insurers, in addition to premium taxes, a special mass-transit surcharge.

Id. at 385. New York law, however, specifically prohibited foreign insurers from counting that surcharge when computing retaliatory taxes. *Id.* at 385-386. A Texas automobile insurer challenged that provision under the Equal Protection Clause. *Id.* at 386-387.

The Court of Appeals observed that, under *Western & Southern*, "a system of retaliatory taxation, which by definition discriminates between domestic and foreign insurance companies, is constitutionally sound insofar as it aims to equalize the tax burden of domestic and foreign insurers, but the imposition of retaliatory tax beyond the point of equalization solely to generate revenue at the expense of foreign insurers lacks legitimacy." 668 N.E.2d at 388. "In other words," the court continued, "absent a legitimate purpose apart from simple revenue creation, a State may only retaliate to the extent of the difference between its actual and the foreign State's hypothetical tax bill." *Ibid.* The court held the denial of a credit for the surcharge unconstitutional under that standard because "the validating purpose of retaliatory taxation—to equalize the tax burden of domestic and foreign insurers– requires that the retaliatory tax assessment take into account the amount of taxes already paid to the State by the foreign insurer." *Id.* at 388-389. Because the State had attempted to tax "beyond the point of equalization," the denial of the credit was "unsupported by a legitimate purpose and therefore violate[d] the Equal Protection Clause." *Id.* at 389.

2. The Texas Supreme Court's decision below, by contrast, holds that the Equal Protection Clause allows States to calculate retaliatory tax by ignoring 85% of the amount the insurance company remits. See App., *infra*, 20a-23a. The tax is constitutional, the court believed, because it still "exerts some downward pressure on foreign tax rates." *Id.* at 22a. The dissent, by contrast, saw "no rational basis for comparing 100% of another state's

premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive." *Id.* at 34a.

Although the particular statute at issue here differs from the statutes at issue in *American Fire* and *Curiale*, those cases and the decision below reach opposite results on parallel constitutional issues. The New Jersey Supreme Court rejected the tax division's position because it would impose retaliatory taxes even on insurers who "hail from states with a *lower* tax rate than New Jersey's." *American Fire*, 912 A.2d at 137 (emphasis added). And the New York Court of Appeals rejected the State's position because it would tax "beyond the point of equalization." *Curiale*, 668 N.E.2d at 389. As the dissent below points out, Texas's new interpretation has precisely the same defects: It imposes taxes "even when insurers hail from states imposing lower premium taxes than Texas," and it taxes far beyond the point necessary to "equalize[] * * * tax burden[s]." App., *infra*, 27a-28a.

Other cases have similarly rejected challenges to retaliatory taxes under the Equal Protection Clause or analogous state provisions—even though some of the applications of the taxes were constitutionally dubious. For example, in *Sun Life Assurance Co. of Canada* v. *Manna*, 879 N.E.2d 320, 325-328 (Ill. 2007), the Illinois Supreme Court upheld a retaliatory tax as applied to an *alien* insurer, even though foreign-relations principles precluded the State from seeking to influence the foreign government's policies. In *Premera Blue Cross* v. *State*, 171 P.3d 1110, 1121-1124 (Alaska 2007), the Alaska Supreme Court rejected a challenge to that State's retaliatory tax, even though the evidence that any Alaska insurer had ever done business outside the State was concededly "sparse." In *TIG Insurance Co.* v. *Department of Treasury*, 629 N.W.2d 402 (Mich. 2001), the Michigan Supreme Court overturned a judgment holding unconsti-

tutional an amendment to the State's retaliatory tax statute that prohibited insurance companies from counting mandatory assessments paid to state-organized third-party funds as "taxes" when computing their retaliatory tax. Other cases abound. See, *e.g.*, *Prudential Ins. Co. of Am.* v. *Comm'r of Revenue*, 709 N.E.2d 1096, 1102-1103 (Mass. 1999); *Gallagher* v. *Motors Ins. Corp.*, 605 So. 2d 62, 70-71 (Fla. 1992); *Mut. Life Ins. Co. of N.Y.* v. *Washburn*, 561 N.E.2d 29, 37-38 (Ill. 1990); *Prudential Prop. & Cas. Ins. Co.* v. *Dep't of Treasury*, 725 N.W.2d 477, 484 (Mich. App. 2006); *State Farm Mut. Auto. Ins. Co.* v. *Long*, 497 S.E.2d 451, 455 (N.C. App. 1998) (2-1 decision); *Am. S. Ins. Co.* v. *State*, 674 So. 2d 810, 814-815 (Fla. App. 1996); *Executive Life Ins. Co.* v. *Commonwealth*, 606 A.2d 1282, 1285-1286 (Pa. Cmwlth. 1992).[5] Notwithstanding this Court's 27-year-old decision in *Western & Southern*, therefore, the scope and nature of the equal protection constraints on retaliatory taxes remains an issue that is recurring, hotly disputed, and of substantial importance to the industry.

B. The Texas Supreme Court's Decision Threatens the Stability of the National Retaliatory Tax Network

1. While there is no shortage of constitutional disputes over retaliatory taxes, one is hard pressed to find a decision upholding a more blatant distortion of the system. For years, Texas, like other States, allowed title in-

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[5] The reported cases, moreover, understate the frequency with which such issues arise. For example, Stewart Title challenged an application of Oregon's retaliatory tax on equal protection grounds in a case that later settled. See *State* v. *Stewart Title Guar. Co.*, No. 99C-14628 (Or. Marion County Cir. Ct. filed 1999). And multiple insurance companies were involved in long-running proceedings before the California State Board of Equalization involving similar issues. See, *e.g.*, *Old Republic Nat'l Title Ins. Co.*, Nos. IT ET 34-001644-020, -030 (Cal. State Bd. of Equalization 1998).

surance companies to compute retaliatory taxes by comparing the *actual amounts* they remitted to Texas with the taxes imposed by their home States. That system worked, and made sense, because States collect premium taxes from insurance companies, not their agents. See App., *infra*, 75a-76a (collecting statutes).[6] As a result, the statute made an "apples to apples" comparison: It compared the insurance taxes actually imposed in one State with the insurance taxes actually imposed in the other.

As the court explained below, "[t]his system * * * operated with minimal change until a few years ago when the Comptroller reinterpreted the retaliatory tax statute in a way that sharply increased the tax liability of certain non-Texas title insurers." App., *infra*, 2a. That new interpretation was not prompted by any change in the relevant statutes; it was not accompanied by any new development in who paid whom during a typical title insurance transaction; and it did not reflect anything new about the underlying economics. Rather, the Comptroller simply adopted a new interpretation under which 85% of the tax the insurance company remits to Texas is ignored in comparing tax burdens for purposes of computing retaliatory tax. See *id.* at 5a.

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[6] The statutes cited in the Appendix by their terms impose premium taxes on "insurance companies" or "insurers," not title agents. Petitioners are aware of no other State that, like Texas, has construed such language to mean that part of the tax remitted by the insurance company is actually "paid" by someone else. Respondents have never identified such a State either. Respondents have pointed out that some States, such as California, calculate the insurance company's tax based on net rather than gross premiums. Cf. Pet. App. 18a-19a. But that is beside the point: The relevant fact is that, unlike Texas, those States do not deem part of the premium tax to be paid by another entity that they then exclude from the retaliatory tax calculation.

As the dissent thoroughly explains, that new approach "makes no sense." App., *infra*, 34a. Under the State's "new math," foreign States' taxes will virtually always look much higher than Texas's artificially reduced taxes. See *id.* at 28a. As a result, out-of-state insurers will virtually always pay substantial retaliatory tax in Texas, even when their home State's taxes are *lower* than Texas's. See *ibid.* The only way other States can avoid retaliation is by either (1) reducing their premium tax levels to *15%* of Texas's level; or (2) adopting Texas's novel accounting construct that most of the tax the insurance company remits is deemed "paid" by someone else. Because neither of those could plausibly be expected to occur, the Texas retaliatory tax now simply operates as an arbitrary exaction on out-of-state, and only out-of-state, insurance companies. See *ibid.*

2. The potential consequences of the Texas Supreme Court's ruling are far-reaching. The decision's immediate impact is obvious: Out-of-state title insurers who do business in Texas will pay retaliatory tax in more instances, and in significantly greater amounts, than they did before. The court below admitted as much, noting that the State's new interpretation would "substantially" and "sharply" increase foreign insurers' taxes. App., *infra*, 2a, 5a. For a Minnesota title insurer like Old Republic, the State's new math results in almost a *three-fold increase* in retaliatory tax—and total taxes substantially higher than what either Texas or Minnesota insurers pay in their respective States. See p. 8, *supra*. Out-of-state insurers will also pay retaliatory tax even when their home States impose *lower* premium taxes than Texas does. See App., *infra*, 28a. That impact will continue, year after year, into the indefinite future.

The total impact on the title insurance industry will be substantial. Title insurance is a $14 billion a year industry, with almost one hundred title insurance companies

active across the country. See Am. Land Title Ass'n, *2007 Title Insurance Industry Statistical Analysis: Premiums Earned*, http://www.alta.org/industry/07ALL/07_TitleIndustryStatisticalAnalysis_Fam&Co.xls. Because Texas's artificially reduced tax burden looks much lower than any other State's tax burden, out-of-state title insurance companies will now pay discriminatory taxes in Texas regardless of which State they come from. And those taxes could not come at a worse time for the title insurance industry, which is already being devastated by the nationwide collapse of the real estate market. See A.M. Best Co., *2008 Special Report: Title Insurers Feel the Pain As Housing Market Ills Continue* (Oct. 13, 2008), http://www.alta.org/industry/AMBest08.pdf.

The consequences of the Texas Supreme Court's decision have not gone unnoticed. The decision has already attracted attention—and harsh criticism—from the trade press. See *Texas Court Approves Double Counting of Premium Tax*, Title Insurance Law Newsletter, June 2008, at 4 ("Defying logic and ignoring basic math, the Texas supreme court has approved the Department of Insurance's 'reinterpretation' of the retaliatory tax * * * . The ultimate irony is that a tax which was supposed to equalize tax burdens is interpreted in such a way as to make them hugely disparate."); see also *Texas Comptroller Wins in Retaliatory Tax Dispute, In Spite of Justices' Blistering Dissent*, Legal Description, June 3, 2008.

The decision's impact, moreover, is not limited to the Texas retaliatory tax, nor is it limited to the title insurance industry. Nearly all States have retaliatory taxes, and those statutes apply to all sorts of insurance. See App., *infra*, 73a-74a. Annual premiums in the broader insurance industry are measured in the hundreds of billions of dollars. See A.M. Best Co., *Best's Aggregates & Averages: Property/Casualty* 162 (2008). Although there have been disputes about the constitutionality of particu-

lar applications of those statutes in the past, this case sets a new benchmark for what courts will tolerate. Without changing the statute, the payment mechanics, or the economic realities, Texas was able to *triple* its retaliatory tax revenue simply by adopting "new math." The Texas Supreme Court's approval of that reinterpretation will almost surely embolden other tax officials to attempt similar ploys, particularly in States grappling with budget shortfalls. Unless the court's decision is corrected, other state courts will feel little compunction about sustaining such devices.

The Texas Supreme Court's decision will also encourage other States to take counter-retaliatory measures. Minnesota has already indicated that it may do so: Following the intermediate court's decision in this case, the Minnesota Department of Revenue published a ruling interpreting its own retaliatory tax statute in a way that would result in counter-retaliation against Texas title insurers. See Revenue Notice #06-01, 30 Minn. State Register 1030 (Mar. 27, 2006).[7] The Texas Supreme Court's decision thus invites a potentially endless spiral of retaliation and counter-retaliation. The result will be at best unfair and discriminatory taxation of out-of-state insurers, and at worst a complete breakdown of the interstate retaliatory tax system.

Retaliatory taxes serve their intended equalizing function only if state tax authorities make meaningful, "apples-to-apples" comparisons when measuring relative tax burdens. The State's new interpretation does nothing of the sort, and the Texas Supreme Court's decision uphold-

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[7] The Minnesota revenue ruling accomplishes that result by requiring foreign insurance companies to include any *retaliatory* taxes a Minnesota insurer would pay in the foreign State in comparing relative tax burdens for purposes of computing the Minnesota retaliatory tax. See 30 Minn. State Register at 1030-1031.

ing its approach will have grave consequences for the insurance industry. In light of the importance of this issue, the Court should grant review.[8]

II. The Decision Below Upholds Precisely The Type Of Arbitrary, Discriminatory Taxation Of Non-Resident Insurance Companies That This Court's Precedents Proscribe

Review is also warranted because the Texas Supreme Court's decision authorizes blatant discrimination against non-resident insurance companies. That is precisely the sort of discrimination this Court has long condemned.

A. This Court's Cases Prohibit Arbitrary Discrimination Against Out-of-State Insurance Companies

In cases spanning a century, this Court has refused to rubber-stamp tax statutes that facially discriminate against non-resident insurance companies. The Court addressed the issue most recently in *Metropolitan Life Insurance Co.* v. *Ward*, 470 U.S. 869 (1985). That case concerned the validity of an Alabama premium tax statute that taxed out-of-state insurance companies at a higher rate than domestic insurers. *Id.* at 871-872. The State defended the tax as promoting the formation of new domestic insurance companies and encouraging capital investment in the State. *Id.* at 876, 882. The Court, however, held those interests illegitimate because they constituted "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878. The "crucial distinction" between Alabama's tax and the retaliatory tax in *Western & Southern*, the Court explained, was that the retaliatory tax in *Western & Southern* served the legitimate purpose of "promot-

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[8] The Court may also wish to consider calling for the views of the Solicitor General, as it did in *Western & Southern*. See n.1, *supra*.

[ing] the *interstate* business of domestic insurers by deterring *other States* from enacting discriminatory or excessive taxes," whereas "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State." *Id.* at 876-878.

Similarly, in *Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494 (1926), this Court struck down a state occupation tax on insurance receipts that applied only to out-of-state insurance companies. *Id.* at 506, 516. The Court condemned the statute as a "heavy discrimination in favor of domestic insurance companies" that effected "a denial of the equal protection of the laws." *Id.* at 516.

In *Reserve Life Insurance Co.* v. *Bowers*, 380 U.S. 258 (1965), this Court summarily reversed a state-court ruling upholding a discriminatory tax on out-of-state insurance companies. The Court cited its earlier decision in *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949), which had struck down an Ohio tax on foreign corporations. "It seems obvious that appellants are not accorded equal treatment," the Court observed in *Wheeling Steel*, "and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residen[ce] of the owner." *Id.* at 572. That "discrimination[] den[ied] appellants equal protection of [the] law." *Id.* at 574.

This Court has reached the same result outside the insurance context as well. In *Southern Railway Co.* v. *Greene*, 216 U.S. 400 (1910), for example, the Court struck down a discriminatory tax on foreign corporations on equal protection grounds. The Court conceded that a "reasonable classification is permitted," but cautioned that "such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed." *Id.* a. 417. The classification could not

be "arbitrarily made without any substantial basis." *Ibid.* The State's distinction between domestic and foreign companies did not meet that standard. See *id.* at 417-418.

Likewise, in *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117 (1968), this Court found an equal protection violation where New Jersey denied a tax exemption to a corporation "solely because of [its] foreign incorporation." *Id.* at 119-120. And more recently the Court has held unconstitutional a New Mexico tax exemption for veterans that discriminated on the basis of residence, see *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), as well as a Vermont vehicle use tax credit that discriminated on the basis of residence, see *Williams* v. *Vermont*, 472 U.S. 14 (1985).

Thus, even when applying the rational basis test, this Court has treated the Equal Protection Clause as a meaningful and important constraint on arbitrary taxation that discriminates against non-residents. This Court has routinely struck down such taxes where no adequate justification for the discrimination had been shown.

B. Texas's New Interpretation Conflicts with This Court's Precedents

The Texas Supreme Court's holding authorizes blatant discrimination in violation of this Court's decisions. While still superficially a retaliatory tax, the Texas statute now functions as precisely the sort of facially discriminatory tax this Court struck down in *Ward*, *Hanover Fire*, and *Reserve Life*.

1. This Court upheld the retaliatory tax in *Western & Southern* because it had the legitimate purpose of deterring "discriminatory or excessive taxes" in other States and could reasonably be expected to promote that goal. 451 U.S. at 668-674. Texas's new interpretation completely unmoors its statute from that legitimate pur-

pose. Because Texas now "compar[es] 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive," App., *infra*, 34a, the only way other States could avoid retaliation is if they all reduced their premium taxes to *15%* of Texas's stated rate, or if they all adopted Texas's novel accounting construct that deems most of the tax paid by someone other than the insurance company that actually remits it. Those facts undermine the State's reliance on *Western & Southern*.

While Texas has a legitimate interest in encouraging other States to *equalize* tax burdens, see *Western & Southern*, 451 U.S. at 668-671, it has no legitimate interest in coercing other States into reducing their taxes to *15%* of Texas's rate. Nor does it have any legitimate interest in coercing 49 other States to adopt its own anomalous conception of who is actually paying the tax. Even if those were legitimate interests, moreover, no rational legislator could believe that the retaliatory tax would actually promote those goals. There simply is no realistic prospect that 49 other States will all either reduce insurance taxes *six-fold* or completely rearrange their accounting conceptions solely to accommodate Texas's aberrant understanding. For either of those two reasons, the State's new interpretation violates equal protection.

Because Texas now artificially excludes 85% of its tax burdens, the retaliatory tax "no longer operates to discourage excessive taxation in other states," only "to discourage foreign insurers from doing business in Texas." App., *infra*, 28a. The tax thus functions precisely like the parochial taxes this Court has repeatedly struck down. See pp. 25-27, *supra*. Texas should not be allowed to avoid the fate of those other discriminatory taxes merely by pretending that its tax still functions like a valid retaliatory tax.

2. The responses offered by the Texas Supreme Court are unpersuasive. The court found a legitimate purpose because "[t]he Comptroller did not develop this scheme independently as a revenue-raising plan" but was merely implementing "the statutory scheme developed by the Legislature." App., *infra*, 21a. But that is irrelevant. The Constitution binds state legislatures no less than state tax officials. Whether the irrationality originates from the statute or the official charged with enforcing it is immaterial.

The court also defended the Comptroller's new interpretation on the ground that "[a]ll title insurers operating in Texas, whether domestic or foreign, are subject to the 85/15 premium tax division." App., *infra*, 21a-22a. That too is beside the point. The retaliatory tax by its terms applies only to foreign insurers. Tex. Ins. Code art. 21.46, § 1(a) (2004). That both domestic and foreign insurers split premiums the same way does not change the fact that only foreign insurers pay artificially inflated retaliatory taxes based on that division.

The court did no better in asserting that "foreign title insurers are not taxed merely because they are foreign; they are taxed only if their home states impose higher financial obligations on Texas insurers than Texas imposes on foreign insurers," and that the increase in retaliatory taxes under the State's new interpretation thus "depends just as much on premium tax rates charged by other states as it does on the Comptroller crediting title insurers with only 15% of the total premium tax payment." App., *infra*, 22a. Under the Comptroller's new math, the "premium tax rates charged by other states" are practically irrelevant because, with 85% of Texas's taxes artificially excluded, foreign States' taxes will virtually *always* appear much higher. See *id.* at 28a. It thus simply is not true that the retaliatory tax depends "just as much" on the foreign State's tax rate as on the

Comptroller's new accounting device. In any meaningful sense, out-of-state title insurers are indeed taxed "merely because they are foreign."

Finally, the court defended excluding the 85% share of the premium tax allocated to the agent on the ground that the "correct comparison" for purposes of the retaliatory tax "is between the taxes imposed on insurance companies, not insurance premiums or insurance industries." App., *infra*, 22a-23a. That was so, the court believed, because "[t]he equal protection clause guarantees that similarly situated persons—not similarly situated tax schemes or similarly situated industries—be treated similarly." *Id.* at 23a. That argument confuses the disparate treatment being challenged in this case with the State's *rationale* for that disparate treatment. Retaliatory taxes indisputably discriminate among insurance *companies* because they apply only to foreign insurers, not domestic insurers (and impose varying taxes on foreign companies from different States). See *Premera*, 171 P.3d at 1121. The relevant constitutional question is not whether the statute discriminates between insurance companies, but whether the State has an adequate *justification* for that discrimination. And in answering *that* question, the State cannot simply ignore the fact that Texas—unlike every other State—now ignores 85% of the premium taxes it collects when calculating retaliatory taxes. Comparing only tax burdens imposed on insurance companies makes sense so long as both States collect premium taxes only from insurance companies. But it is completely irrational when one State out of 50 deems 85% of the tax collected from insurers to have been "paid" by other entities and then retaliates against other States because their taxes all suddenly look much higher by comparison.

Simply put, the State's new interpretation causes the statute to function, not as a bona fide retaliatory tax like

the one in *Western & Southern*, but as an arbitrary tax on foreign companies. This Court's equal-protection precedents forbid such discrimination, and for good reason: Out-of-state businesses are an easy target for tax authorities seeking to raise revenue from those who lack the means to defend themselves at the ballot box. This Court should not permit Texas to avoid its precedents by disguising arbitrary discrimination in the guise of a retaliatory tax.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2008

APPENDIX A

SUPREME COURT OF TEXAS

No. 05-0541

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,
Respondents.

ARGUED APRIL 11, 2007.
DECIDED MAY 16, 2008.
REHEARING DENIED AUG. 29, 2008.

Justice WILLETT delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice O'NEILL, Justice GREEN, and Justice JOHNSON joined.

For over a century, Texas has taxed the premiums collected on title insurance policies sold here.[1] For almost as long, Texas has imposed an additional "retaliatory" tax when necessary to equalize the tax burdens borne by

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[1] *See, e.g.*, Act approved May 13, 1905, 29th Leg., 1st C.S., ch. 6, § 1, 1905 Tex. Gen. Laws 427, 427-28 (amending an earlier statute by specifically including title insurance companies in the premium tax scheme).

Texas and foreign-based title insurance companies.[2] This system has operated with minimal change until a few years ago when the Comptroller reinterpreted the retaliatory tax statute in a way that sharply increased the tax liability of certain non-Texas title insurers.

Two of those foreign insurers challenge the Comptroller's revised interpretation,[3] arguing that it contravenes the plain meaning of the controlling statutes and violates the insurers' equal protection rights under the United States and Texas Constitutions. We disagree and, accordingly, affirm the court of appeals' judgment.

I. Background

First American Title Insurance Company (First American) and Old Republic National Title Insurance Company (Old Republic) are out-of-state title insurance companies doing business in Texas. First American is California-based and issues Texas policies directly and also through independent agents; Old Republic is Minnesota-based and issues policies in Texas only through independent agents. Title agents are distinct business entities, usually corporations or limited liability companies, that engage in title insurance work independent of title insurance companies.

The Texas Department of Insurance (TDI) prescribes the premium that insurers may charge policyholders for title insurance.[4] When a title insurer issues policies

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[2] *See* Act of May 2, 1935, 44th Leg., R.S., ch. 307, § 1, 1935 Tex. Gen. Laws 713, 713-14, *repealed by* Act of May 23, 1951, 52nd Leg., R.S., ch. 491, § 4, 1951 Tex. Gen. Laws 868, 1093.

[3] The original Respondent to this appeal was the predecessor to the present Comptroller. As the former Comptroller left office before this appeal was disposed of, "the public officer's successor is automatically substituted." TEX. R. APP. P. 7.2(a).

[4] Act of June 7, 1951, 52nd Leg., R.S., ch. 491, § 1, art. 9.03, 1951 Tex. Gen. Laws 868, 970-71, *amended by* Act of June 7, 1955, 54th

through an independent agent, TDI also prescribes how the insurance company and the agent should divide the premium.[5] During the period relevant to this case, TDI allowed agents to keep 85% of premiums collected from policyholders and remit the remaining 15% to the insurer.[6] Texas insurance law subjects the full amount of the premium to a premium tax;[7] for logistical simplicity,

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Leg., R.S., ch. 489, § 3, 1955 Tex. Gen. Laws 1223, 1224-25, *amended by* Act of May 4, 1967, 60th Leg., R.S., ch. 219, § 1, art. 9.07, 1967 Tex. Gen. Laws 490, 493-94, *amended by* Act of May 31, 1975, 64th Leg., R.S., ch. 409, § 4, 1975 Tex. Gen. Laws 1063, 1065-67, *amended by* Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 6, 1987 Tex. Gen. Laws 3610, 3627-28, *amended by* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, § 16.02, art. 9.07, 1993 Tex. Gen. Laws 2559, 2677-78, *amended by* Act of May 7, 1995, 74th Leg., R.S., ch. 127, § 6, 1995 Tex. Gen. Laws 949, 949-51, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (current version at TEX. INS. CODE § 2703.151(a)). Although the relevant statutes have since been recodified, we will refer to them as they were written from 2001 to 2002, the tax years in controversy here.

[5] Act of May 4, 1967, 60th Leg., R.S., ch. 219, § 1, art. 9.30, 1967 Tex. Gen. Laws 490, 504, *amended by* Act of May 31, 1975, 64th Leg., R.S., ch. 409, § 12, 1975 Tex. Gen. Laws 1063, 1069-70, *amended by* Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 8, art. 9.30, 1987 Tex. Gen. Laws 3610, 3630-31, *amended by* Act of May 7, 1995, 74th Leg., R.S., ch. 127, § 11, 1995 Tex. Gen. Laws 949, 952, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (current version at TEX. INS. CODE § 2502.054(b)(1)).

[6] 28 TEX. ADMIN. CODE § 9.1 (adopting Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in Texas, which is available at http://www.tdi.state.tx.us/title/titlem4d.html#P-23 and specifies a 15/85 split of the premium between insurer and agent).

[7] Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 22, art. 9.59, 1987 Tex. Gen. Laws 3610, 3638-39, *amended by* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, § 3.19, 1993 Tex. Gen. Laws 2559, 2591, *amended by* Act of May 22, 1997, 75th Leg., R.S., ch. 1423, § 11.35, 1997 Tex. Gen. Laws 5329, 5390, *amended by* Act of May 20, 1999, 76th Leg.,

the title insurers remit the full amount of tax on these premiums to the State.[8] All title insurance companies operating within the State, Texas-based or not, are subject to the premium tax.[9]

Besides this premium tax, Texas also imposes a retaliatory tax on foreign title insurers like First American and Old Republic if their home states impose more burdensome taxes, fees, and other obligations on Texas title insurers selling insurance there than Texas imposes on foreign title insurers selling insurance here.[10] The "principal purpose" behind retaliatory taxes, as the United States Supreme Court explained when it upheld their constitutionality, "is to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes" against foreign

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R.S., ch. 852, § 3, 1999 Tex. Gen. Laws 3520, 3521, *amended by* Act of May 26, 2001, 77th Leg., R.S., ch. 763, § 4, 2001 Tex. Gen. Laws 1501, 1502-03, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (current version at TEX. INS. CODE §§ 223.001-.011) [hereinafter Former TEX. INS. CODE art. 9.59].

[8] Former TEX. INS. CODE art. 9.59, § 8(b).

[9] § 1.

[10] Act of May 22, 1957, 55th Leg., R.S., ch. 396, § 1, 1957 Tex. Gen. Laws 1184, 1184-85, *amended by* Act of May 30, 1983, 68th Leg., R.S., ch. 622, § 16, 1983 Tex. Gen. Laws 3891, 3929-31, *amended by* Act of July 3, 1984, 68th Leg., 2nd C.S., ch. 31, Art. 4, § 5, 1984 Tex. Gen. Laws 193, 221, *amended by* Act of May 28, 1989, 71st Leg., R.S., ch. 237, § 3, 1989 Tex. Gen. Laws 1102, 1106, *amended by* Act of May 22, 1989, 71st Leg, R.S., ch. 242, § 6, 1989 Tex. Gen. Laws 1151, 1154, *amended by* Act of May 18, 1995, 74th Leg., R.S., ch. 279, § 9, 1995 Tex. Gen. Laws 2619, 2622, *amended by* Act of May 20, 1999, 76th Leg., R.S., ch. 852, § 4, 1999 Tex. Gen. Laws 3520, 3521-22, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138 (current version at TEX. INS. CODE §§ 281.001-.007) [hereinafter Former TEX. INS. CODE art. 21.46].

insurance companies.[11] Retaliatory taxes are ubiquitous, having "been a common feature of insurance taxation for over a century,"[12] and they exist in every state except Hawaii.[13]

First American and Old Republic remitted premium and retaliatory taxes to the Comptroller, calculating the retaliatory tax owed based on the full amount of premium taxes they remitted to the State. Thus, they included not only the premium tax paid on the 15% of the premium they earned but also the premium tax paid on the 85% of the premium earned by independent agents. However, in 1996 the Comptroller adopted a new rule that recognized the agent's responsibility for "taxes due on the agent's portion of the premium."[14] This change resulted in a new method of calculating the retaliatory tax. The Comptroller reasoned that because title insurers keep only 15% of premiums collected on agent-issued policies and pay only 15% of the premium tax—despite remitting the entire 100% to the State—foreign title insurers could count only that 15% when figuring the amount of retaliatory tax owed. The result of this new math: the foreign insurers' premium tax liability dropped compared with what other states imposed on Texas insurers, thus substantially increasing the foreign insurers' retaliatory tax liability.

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[11] *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

[12] *Id.*

[13] *See* HAW. REV. STAT. § 431:7-206 (granting domestic insurance companies a tax credit for the amount of retaliatory tax paid to other states); *Prudential Ins. Co. of Am. v. Comm'r of Revenue*, 429 Mass. 560, 709 N.E.2d 1096, 1098, 1100 n.7 (1999).

[14] 21 Tex. Reg. 838 (1996), *adopted* 21 Tex. Reg. 3948 (1996) (codified at 34 TEX. ADMIN. CODE § 3.831(3)(B)) (current version at 34 TEX. ADMIN. CODE § 3.831(4)(B)).

The Comptroller's interpretive change required First American to pay an extra $1,432,580.76 in retaliatory taxes and interest for tax years 2001 and 2002, which First American paid under protest. Old Republic paid a total of $219,626.40 in retaliatory taxes for tax year 2002 based on the new method, also under protest. The insurers then filed separate lawsuits in district court to recover the excess tax payments incurred as a result of the Comptroller's new interpretation of the retaliatory tax statute. In each case, the insurer and the Comptroller filed cross-motions for summary judgment; in each case, the trial judge awarded summary judgment to the Comptroller without elaboration. Both insurers appealed; their appeals were consolidated; and the court of appeals affirmed, holding that the Comptroller's revised interpretation of the statutes was reasonable and constitutional.[15]

II. Standard of Review

The insurers argue the Comptroller's interpretive change offends the plain meaning of the relevant Insurance Code provisions and also violates the equal protection clauses of the United States and Texas Constitutions. Since "cases should be decided on narrow, nonconstitutional grounds whenever possible,"[16] we begin with the statutory claim, examining the statutes as they existed in tax years 2001-02, the time of this dispute.

The construction of a statute is a question of law we review de novo.[17] When interpreting a statute, we look first and foremost to the plain meaning of the words used.[18] "If the statute is clear and unambiguous, we must

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[15] 169 S.W.3d 298, 302-03, 313.

[16] *VanDevender v. Woods*, 222 S.W.3d 430, 433 (Tex. 2007).

[17] *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

[18] *Id.*

apply its words according to their common meaning"[19] in a way that gives effect to every word, clause, and sentence.[20] And ordinarily, when divining legislative intent, "the truest manifestation" of what lawmakers intended is what they enacted, "the literal text they voted on."[21]

The insurers argue that, because the retaliatory tax provision is "penal" in nature, we should strictly interpret its language and resolve any ambiguities against the Comptroller. The Supreme Court has cast doubt on whether retaliatory taxes are penal in nature: "the principal purpose of retaliatory tax laws is to promote the interstate business of domestic insurers . . . 'their ultimate object is not to punish foreign corporations doing business in the state.'"[22] Furthermore, although we have applied "a stricter construction" to tax statutes in the past, we have done so only when "doubt about [the statute's] application still remains after dominant rules of construction have been applied."[23] One of those "dominant rules of construction" requires us to give "serious consideration" to the "[c]onstruction of a statute by the administrative agency charged with its enforcement."[24] The retaliatory tax statute states that "the comptroller

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[19] *Id.*

[20] *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006) (*quoting City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003)).

[21] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006).

[22] *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981) (quoting P.H. Vartanian, Annotation, *Constitutionality, Construction, Operation, and Effect of Retaliatory Statutes Against Foreign Corporations Doing Business Within State*, 91 A.L.R. ANN. 795 (1934)).

[23] *Calvert v. Tex. Pipe Line Co.*, 517 S.W.2d 777, 781 (Tex. 1974).

[24] *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

shall impose" the retaliatory tax.[25] The premium tax statute provides that "the commissioner or comptroller, as appropriate, may adopt rules, regulations, minimum standards, and limitations that are fair and reasonable as may be appropriate for the augmentation and implementation of this article."[26] Because the Legislature charged the Comptroller with enforcement of these statutes, we will uphold her interpretation "so long as the construction is reasonable and does not contradict the plain language of the statute."[27]

III. Discussion

First American and Old Republic contend that the Comptroller's interpretation of the retaliatory tax scheme improperly excludes a portion of the premium tax that they are obligated to pay under the premium tax provision, ultimately resulting in artificially high retaliatory taxes. Article 21.46 of the Insurance Code—the retaliatory tax provision operative at the time this dispute arose—requires the Comptroller to impose a retaliatory tax on an out-of-state insurance company when the financial burden imposed on Texas insurers by a foreign state exceeds the aggregate of taxes and other obligations "directly imposed" on foreign insurers by Texas.[28] The parties agree that the principal obligation "directly imposed" on title insurers in Texas is the premium tax.

A. The Premium Tax Provision

Article 9.59 of the Insurance Code requires that "[e]ach title insurance company receiving premiums from the business of title insurance shall pay to the comp-

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[25] Former TEX. INS. CODE art. 21.46, § 1(a).

[26] Former TEX. INS. CODE art. 9.59, § 3(c).

[27] *Tarrant Appraisal Dist.*, 845 S.W.2d at 823.

[28] Former TEX. INS. CODE art. 21.46, § 1(a).

troller a tax on those premiums as provided in this article."[29] This tax applies to "all amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent."[30] The Chapter defines a premium as "the total amount of premiums received for the taxable year on title insurance written on property located in this state."[31] Title insurers doing business in Texas are required to file an annual tax return and remit the total amount of tax due directly to the Comptroller.[32] Title insurance agents do not file returns or pay premium taxes directly:

> The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.[33]

The parties agree that Article 9.59 taxes all premiums earned from the provision of title insurance, whether earned by an insurance company or an insurance agent, but the parties disagree on whom the tax is imposed. The insurers argue that they are the only parties obligated by Article 9.59 to pay the premium tax, so the full amount of their payment should be included in the retaliatory tax calculation. The Comptroller responds that although the insurance company remits the entire premium tax, the insurer merely acts as a conduit for 85% of the premium tax, which is actually paid by the insurance agent. According to the Comptroller, because the insur-

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[29] Former TEX. INS. CODE art. 9.59, § 1.

[30] § 8(b).

[31] § 2.

[32] §§ 5, 8(b).

[33] § 8(b).

ance company remits 85% of the premium tax to the State as an administrative mechanism and in economic reality bears only 15% of the tax burden, the insurer can only include 15% of the tax in its calculation of taxes "directly imposed." Thus, the dispute hinges on whether the full premium tax is "directly imposed" on title insurance companies under the retaliatory tax provision.

The Comptroller's application of the premium tax to insurance agents is reasonable and in harmony with the statute's plain meaning. As the insurers point out, Article 9.59 requires the insurance company, not the insurance agent, to report[34] and pay[35] the premium tax on all premiums earned from the provision of title insurance.[36] But the statute also recognizes that agents receive premiums, and it explicitly taxes those premiums: "The premium tax is levied on *all* amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent."[37]

Nevertheless, the insurers contend that the premium tax, while applied to all premiums earned, is not imposed on the agent because "[t]he premium tax is levied on all amounts defined to be premium . . . such tax being in lieu of the tax on the premium retained by the agent."[38] Taken in isolation, this phrase arguably exempts insurance agents from paying the premium tax. But the full context of Subsection 8(b) yields a different understanding. The very next sentence provides that the State "facilitates the collection of the premium tax on the premium retained by the agent" by dividing the premium

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[34] § 5.

[35] § 1.

[36] § 2.

[37] § 8(b) (emphasis added).

[38] *Id.*

between insurer and agent "so that the insurer receives the premium tax due on the agent's portion of the premium."[39] The State would have no need to ensure that insurance companies receive the agent's portion of the premium tax if the tax were not imposed on the agents. Rather, "in lieu of" creating a separate tax collection system for insurance agents, the Legislature implemented an integrated system of taxation with the insurance company acting as the central collection point.[40] The premium tax applies to the premium earned by the agent, and Article 9.59 requires the agent to bear the burden for the agent's portion of the taxes: "the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State."[41]

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[39] *Id.*

[40] This taxation system set up by the Legislature, whereby one party serves as a collection or transfer agent of a tax that is actually imposed on and paid by another, is not novel. Federal and state tax schemes abound with similar collection systems; for example, federal personal income taxes are imposed on individual employees, even though employers remit the bulk of these taxes to the government through the withholding mechanism and face liability for their failure to do so. *See* I.R.C. § 6672(a) (2006); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 467, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) (acknowledging the settled proposition that employees, not employers, bear the burden of income tax); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 97 n.6 (3d Cir. 1994) ("[T]he theory of trust fund taxes (like income tax withholding) is that the tax is imposed on one party (for example, an employee), but is collected and held by another party (for example, the employer)." (quoting *In re Markos Gurnee P'ship*, 163 B.R. 124, 129 & n.4 (Bkrtcy. N.D. Ill. 1993) (internal quotation marks omitted))).

[41] Former TEX. INS. CODE art. 9.59, § 8(b). The insurers argue that, in spite of the plain language of Subsection 8(b), insurance agents do not remit their portion of the premium tax to insurance companies. To support their contention, the insurers point to forms used by TDI in setting the premium division. The title insurer form lists 100% of the premium tax as an expense; the title agent form does not list

Article 9.59 describes the insurer's role as a pass-through entity relied on by the State to "facilitate[ ] the collection of the premium tax"[42] from the insurance agent. At most, the only compulsion or obligation required of the insurer with regard to 85% of the premium tax is to write a check drawn on money remitted by the agent—at the end of the day, the insurer's bank account is not negatively impacted. This administrative burden of acting as a conduit for the agents' tax payments does not rise to the level of a "direct imposition" and therefore cannot be counted as a burden meriting inclusion in the retaliatory tax calculation.

B. Penalties for Noncompliance with the Premium Tax Statute

However, the insurers point out that Article 9.59 requires more of title insurance companies than writing a check; the statute further states that "[a] title insurance company failing to pay all taxes imposed by this article is also subject to Article 4.05 of this code."[43] Article 4.05 requires insurance companies to pay their taxes prior to receiving a certificate of authority to do business in the state; the statute also authorizes the Comptroller to institute a collection action against insurers that underreport gross premium receipts.[44] Thus, the insurers argue that

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premium tax at all. This argument does not persuade us. The title agent form does contain an expense line for the amount of premiums remitted to the title insurer, and the statutory language makes clear that the agent's portion of the premium tax is to be included in that remittance. Furthermore, TDI cannot override the plain language of the premium tax statute.

[42] *Id.*

[43] § 9.

[44] Act of June 7, 1951, 52nd Leg., R.S., ch. 491, § 1, art. 4.05, 1951 Tex. Gen. Laws 868, 923, *amended by* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, Art. 3, § 3.10, art. 4.05, 1993 Tex. Gen. Laws 2559, 2581, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1),

even if insurance agents are taxed on their portion of premiums, insurers alone run the risk of Article 4.05 sanctions for failing to pay the full amount of the premium tax.

The Comptroller alleviated this risk by implementing new policies along with her new interpretation of the tax statutes. These policies allocate responsibility for nonpayment of premium taxes according to the respective tax burdens borne by insurance agents and insurance companies. In 2000, the Comptroller published a new policy making agents directly liable to the Comptroller if they fail to remit their portion of the premium tax to insurers. This understanding was further solidified in 2001, when the Comptroller added the following provision to Insurance Tax Rule 3.831:

> Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable for the tax if the insurer fails to remit the tax due on the agent's portion.[45]

Under this new rule, title insurers cannot be held liable for nonpayment of the agent's portion of the premium tax—insurers will face statutory consequences only if they fail to remit their own portion of the premium tax.

The insurers argue that Rule 3.831 contradicts Section 1 of Article 9.59, which requires insurance companies to pay the premium tax, and Section 2 of Article 9.59, which clarifies that the premium tax applies to all premiums earned. Contrary to the insurers' claims, Rule 3.831 does not alter the payment mechanism set up by Article 9.59; under the plain terms of the Rule, separate liability

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2003 Tex. Gen. Laws 3611, 4138 (current version at TEX. INS. CODE § 203.002).

[45] 34 TEX. ADMIN. CODE § 3.831(4)(C).

applies "if the insurer fails to remit the tax due on the agent's portion."[46] Thus, Rule 3.831 comports with Article 9.59—the insurer remits the premium tax for both the insurer and the agent—while clarifying that each party will be held liable only for the portion of premium tax that it owes.

C. The Retaliatory Tax Provision

Nevertheless, the insurers contend that even if the full amount of the premium tax is not "directly imposed" on them, the Comptroller's interpretation must still fail because it conflicts with various portions of the retaliatory tax provision.

The retaliatory tax provision operative at the time this dispute arose, Article 21.46 of the Insurance Code, allows the Comptroller to impose a retaliatory tax on an out-of-state insurer

> [w]henever by the laws of any other state or territory of the United States any taxes, . . . licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes, . . . licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions *directly imposed* upon a similar insurance company of such other state or territory doing business in this State. . . .[47]

The insurers argue that the retaliatory tax provision does not just require insurance companies to compare the taxes imposed by Texas and their home states, the pro-

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[46] *Id.*

[47] Former TEX. INS. CODE art. 21.46, § 1(a) (emphasis added).

vision also requires them to compare "other obligations . . . directly imposed" by this State.[48] According to the insurers, the Comptroller does not give them credit for all of the burdens they bear; namely, the Comptroller excludes from consideration the obligation to report[49] and remit[50] the full amount of the premium tax to the State.

The last clause of Subsection (a) provides a clearer context for the meaning of "other obligations": "the aggregate of taxes, licenses, fees, fines, penalties or other obligations imposed by this State pursuant to this Article . . . shall not exceed the aggregate of *such charges* imposed by such other state."[51] Here, the Legislature replaced the laundry list of taxes, fees, and other obligations with the words "such charges," indicating that the "other obligations" meant to be included in the retaliatory tax calculations are financial charges "directly imposed" on title insurers. Thus, the administrative responsibilities of filling out forms and remitting the full premium tax do not qualify as "other obligations" under Article 21.46.[52]

D. A Response to the Dissent

The insurers' arguments center on one underlying theme: the Comptroller's interpretation improperly cred-

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[48] *Id.*

[49] Former TEX. INS. CODE art. 9.59 § 5.

[50] §§ 1, 8(b).

[51] Former TEX. INS. CODE art. 21.46, § 1(a) (emphasis added)

[52] The insurers also argue that the Comptroller's new interpretation of the retaliatory tax scheme violates the express mandate of Article 21.46 because the total taxes on premiums earned by foreign title insurers operating in Texas exceeds the total taxes on premiums earned by Texas title insurers operating elsewhere. This argument depends upon an interpretation of Article 9.59 that credits the insurers 100% of the premium tax payment. Having rejected that interpretation of Article 9.59, we also reject this argument.

its foreign title insurers with a lower premium tax payment (15%) than what they actually pay (100%), which results in an improperly high retaliatory tax burden. The dissent frames the issue differently: the Comptroller's interpretation "compare[s] other states' taxes on total premiums with Texas' tax on only the insurer's 15% share," resulting in an unfair comparison "as equal as 15 is to 100."[53] The dissent's argument is premised on an understanding that the retaliatory tax scheme was originally based on a comparison of "the taxes on total premiums" imposed by Texas and other states, and that the retaliatory tax is only fair if it takes into consideration the burdens placed "on the insurance industry"—both the insurer and associated agents.[54] Comparing the tax burden imposed on the entire title insurance industry in Texas and a hypothetical other state, the dissent concludes that the Comptroller has artificially lowered the effective premium tax rate in a way that ensures that all foreign insurers will pay retaliatory taxes, thus generating additional revenue for the State.[55]

We cannot agree with the dissent's portrayal of the retaliatory tax scheme because it fails to comport with the express language of the retaliatory tax statute. The dissent accuses us of employing a "myopic" view of the statute that gives credence to an "artificial allocation" of

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[53] 258 S.W.3d at 646.

[54] *Id.*

[55] The dissent's hypothetical compares two similarly situated insurers earning $1,000 in title premiums. The Texas insurer operating in another state is subject to a 2% premium tax in that state, resulting in a $20 tax payment. The foreign insurer and foreign agent operating in Texas are subject to a 1.35% premium tax—the insurer pays $2.03 on its 15% share, and the agent pays $11.47 on its 85% share. The foreign insurer also pays $17.97 in retaliatory tax. 258 S.W.3d at 646.

the premium tax burden based on payor,[56] but Article 21.46 is clear: the payor matters. The dissent's assertion that "[t]his tax was based on the burden imposed . . . on the insurance industry" ignores the statute's plain language.[57] The "relatively unchanged"[58] language of the retaliatory tax statute instructs the Comptroller to compare the tax burdens "imposed upon any *insurance company*" from Texas operating elsewhere with the tax burdens "directly imposed upon a similar *insurance company*" from elsewhere operating in Texas.[59] If a Texas insurer operating outside the state bears a heavier tax burden under this comparison, then the Comptroller "shall impose" a retaliatory tax "upon . . . any similar *company*" so long as the taxes imposed by Texas "on an *insurance company*" from out-of-state do not exceed the taxes imposed by another state "on a similar *insurance company*" from Texas.[60] Thus, the retaliatory tax is imposed only on insurers based only on the other tax burdens borne by insurers. The Comptroller does not, and cannot, compare the taxes on total premiums, take into consideration the taxes paid by agents, or look to the burden borne by the industry as a whole because the Legislature set the focus of the retaliatory tax scheme on a single entity—the insurance company.

Once we employ the same focus dictated by the Legislature—comparing the burdens borne only by title insurance companies—the dissent's numbers balance out. Under the dissent's hypothetical, a Texas insurer operating out-of-state pays $20 in premium taxes; the out-of-state insurer also pays $20—$2.03 of premium tax and

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[56] 258 S.W.3d at 645.

[57] *Id.*

[58] *Id.*

[59] Former TEX. INS. CODE art. 21.46, § 1(a) (emphasis added).

[60] *Id.* (emphasis added).

$17.97 of retaliatory tax. Thus, the retaliatory tax fulfills its role as an equalizer between similarly situated title insurers. Furthermore, when we focus on the proper tax base—the foreign insurer's $150 premium—the effective premium tax rate remains 1.35%—the statutorily designated rate.[61] As for the $11.47 tax burden borne by the foreign agent, a Texas agent operating in Texas would pay the same amount of premium tax, and the foreign operations of either Texas or foreign agents are not at issue because Article 21.46 neither aggregates an agent's tax burdens nor imposes the retaliatory tax on agents. The dissent expresses concern that the Comptroller's interpretation of the tax scheme would impose retaliatory tax on an insurer from a state with a lower premium tax rate than Texas, but this concern is misplaced. Article 21.46 does not impose a tax based on comparative tax *rates*; it does so based on comparative tax *burdens*. If, as in the dissent's example, another state applies a lower tax rate to a larger tax base in a way that requires a Texas insurer to pay more total taxes, then the retaliatory tax would properly apply to equalize the total taxes paid.

The dissent also argues that the Comptroller's interpretation fails to comply with the directive of Article 21.46 to impose the retaliatory tax "in the same manner and for the same purpose" as the taxes imposed on Texas insurers by foreign states. Specifically, the dissent asserts that the Comptroller's scheme compares the insurer's 15% premium tax burden in Texas with the full premium tax burden imposed in other states. The record flatly contradicts this assertion: the retaliatory tax worksheet filled out by First American provides for gross premiums earned, and then—recognizing that California, First American's home state, splits the premiums between insurers and agents—allows a reduction for "[p]re-

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[61] Former TEX. INS. CODE art. 9.59, § 4.

miums retained by underwritten title companies," what Texas would call title agents. Thus, the "[t]otal premiums subject to tax" are only those premiums retained by the title insurance company—precisely the "apples-to-apples" comparison the dissent calls for. Not all states split the tax burden between insurers and agents like Texas and California, but as we have already noted, Article 21.46 charges the Comptroller with assessing the retaliatory tax based on the burdens imposed on the insurer alone. If other states choose to impose the full premium tax on the insurer, then the Comptroller is not out-of-bounds—indeed she is only following the statutory mandate—by comparing that tax to the tax imposed on the insurer's 15% premium in Texas. The Comptroller's current interpretation may represent a change from past practice, but it is squarely in line with the 1987 legislative amendments that first established the agent-insurer pass-through premium tax collection system, which is all we require.[62]

In sum, First American and Old Republic have failed to show that the full amount of the title insurance premium tax is "directly imposed" upon them for purposes of Article 21.46. The Comptroller's interpretation of the retaliatory tax scheme comports with the plain language of the premium and retaliatory tax provisions of

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[62] *See Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 247, 249 (Tex. 1991) (upholding Comptroller's change in forty-two year franchise tax collection practice when change was in line with "the clear intent of the Legislature."). Nor is the change here as drastic as in *House of Lloyd*. The Comptroller's reinterpretation of the retaliatory tax scheme began less than ten years after the 1987 amendments to Article 9.59. *See* Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 22, 1987 Tex. Gen. Laws 3610, 3638-39 (amended 1993, 1997, 1999, 2001 and repealed 2003); *supra* note 13.

the Insurance Code; therefore, we reject the insurers' statutory claim.

IV. Equal Protection Rights

First American and Old Republic further argue that the Comptroller's interpretation of the retaliatory tax scheme violates their equal protection rights under the United States and Texas Constitutions. "[T]he federal analytical approach applies to equal protection challenges under the Texas Constitution,"[63] so resolution of the federal equal protection claim will also resolve the State equal protection claim. We conclude that the Comptroller's interpretation of the relevant statutes does not violate the insurers' equal protection rights.

The equal protection clause of the Fourteenth Amendment forbids a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[64] However, the Supreme Court has recognized that "most laws differentiate in some fashion between classes of persons"; therefore, unless a classification "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic," the law will be upheld as long as it is rationally related to a legitimate state interest.[65] This rational-basis review requires us to answer two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"[66]

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[63] *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 266 (Tex. 2002).

[64] U.S. CONST. amend. XIV, § 1.

[65] *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

[66] *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

As we already noted, the Supreme Court previously upheld a retaliatory tax provision similar to Article 21.46, holding that the tax provision had a legitimate purpose of promoting "domestic industry by deterring barriers to interstate business."[67] The insurers argue that, unlike the California statute upheld by the Supreme Court, the Comptroller's application of the Texas retaliatory tax scheme neither promotes domestic title insurers nor deters foreign taxation; rather, the Texas law has the purpose and effect of raising revenue at the expense of foreign title insurers. To support their argument, the insurers point out that the Comptroller's new interpretation raises nearly three times more retaliatory tax revenue than the prior interpretation and taxes the 85% premium portion twice (once at the premium-tax stage and once at the retaliatory-tax stage). According to the insurers, these changes raise revenue but do not deter other states from taxing Texas-based insurers because foreign states would have to reduce premium tax rates by as much as 80% to match the premium tax burden imposed on insurers by Texas law as currently interpreted by the Comptroller. The insurers contend that other states will likely respond not by lowering premium tax rates but by counter-retaliating against Texas insurers.

We disagree that these effects necessarily demonstrate an impermissible purpose underlying the Comptroller's construction of the retaliatory tax scheme. The Comptroller did not develop this scheme independently as a revenue-raising plan; as we have already discussed, the Comptroller's interpretation is consistent with the statutory scheme developed by the Legislature. Furthermore, the Comptroller's construction of the retaliatory tax system does not impermissibly discriminate against foreign title insurers. All title insurers operating

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[67] *Id.* at 671, 101 S. Ct. 2070.

in Texas, whether domestic or foreign, are subject to the 85/15 premium tax division. Moreover, foreign title insurers are not taxed merely because they are foreign; they are taxed only if their home states impose higher financial obligations on Texas insurers than Texas imposes on foreign insurers. The Comptroller's application of the retaliatory tax scheme may result in an increase in retaliatory taxes collected, but the increase depends just as much on premium tax rates charged by other states as it does on the Comptroller crediting title insurers with only 15% of the total premium tax payment. Therefore, the Comptroller's interpretation exerts some downward pressure on foreign tax rates, regardless of how other states choose to respond. The Comptroller's implementation of the retaliatory tax scheme may have unforeseen or unintended results, but "the courts are not empowered to second-guess the wisdom of state policies. Our review is confined to the *legitimacy* of the purpose."[68] The Comptroller's interpretation demonstrates a legitimate state purpose of protecting Texas title insurers by pressuring other states to keep their premium taxes low.

As for the second prong of equal protection analysis, the challenged interpretation will survive "if we conclude that [the Comptroller] rationally could have believed that the retaliatory tax would promote its objective."[69] We have no trouble concluding that the Comptroller rationally could have believed that reducing the premium tax burdens Texas imposes on title insurers operating here would encourage other states to impose lower financial obligations on Texas title insurers operating elsewhere. The dissent disagrees, stating that "there is no rational basis for comparing 100% of another state's premium

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[68] *Id.* at 670, 101 S. Ct. 2070 (citation omitted).

[69] *Id.* at 672, 101 S. Ct. 2070 (emphasis omitted).

taxes with 15% of Texas' premium taxes,"[70] but again, the correct comparison is between the taxes imposed on insurance companies, not insurance premiums or insurance industries. The equal protection clause guarantees that similarly situated persons—not similarly situated tax schemes or similarly situated industries—be treated similarly. The Comptroller's interpretation of the retaliatory tax scheme equalizes the tax burdens borne by title insurers in a way that is rationally related to a legitimate state purpose; therefore, we reject the insurers' federal and state equal protection claims.

V. Conclusion

The Comptroller implemented the premium and retaliatory tax provisions in a way that comports with the plain meaning of those statutes without offending the United States or Texas Constitutions. We therefore affirm the court of appeals' judgment.

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[70] 258 S.W.3d at 646.

Justice HECHT, joined by Justice WAINWRIGHT, Justice BRISTER, and Justice MEDINA, dissenting.

Texas, like most other states,[1] taxes gross premiums for insurance of risks and property in the state,[2] and like every other state but Hawaii,[3] Texas imposes an additional retaliatory tax on out-of-state insurers doing business in Texas whose home states tax more heavily than Texas does, all other things being equal.[4] Such retaliatory taxes have been "a common feature of insurance taxation for over a century",[5] and though they obviously impinge on interstate commerce, they do not implicate the "implied limitation on the power of the States to interfere with or impose burdens on interstate commerce" contained in the Commerce Clause of the United States Constitution because "Congress removed all Commerce

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[1] CCH STATE TAX GUIDE, ALL STATES ¶ 88, at 9705 (2006) (stating that gross premiums taxes are "the most common form of insurance company tax" and are "imposed in every state upon some kind of insurance company").

[2] TEX. INS. CODE §§ 221.001-228.007.

[3] *Prudential Ins. Co. of Am. v. Comm'r of Rev.*, 429 Mass. 560, 709 N.E.2d 1096, 1098, 1099 n.7 (1999).

[4] TEX. INS. CODE §§ 281.001-.052, *formerly* TEX. INS. CODE art. 21.46. The retaliatory provision compares not just premium taxes but "the sum of the taxes or other charges, prohibitions, and restrictions imposed" on an insurer. *Id.* §§ 281.004(a)(2) ("The comptroller shall impose and collect a tax or other charge or a prohibition or restriction on a foreign insurer authorized to engage in business in this state if . . . the sum of the taxes or other charges, prohibitions, and restrictions imposed by that other state is more than the sum of the taxes or other charges, prohibitions, and restrictions that this state directly imposes on the foreign insurer."), 281.052 (providing for "a penalty or other obligation", under certain circumstances, to match the penalty or obligation imposed on a domestic insurer by the foreign insurer's state of organization). This case involves only taxes.

[5] *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."[6] But the Fourteenth Amendment Equal Protection guaranty does not permit states to impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."[7] "[T]he principal purpose of retaliatory tax laws is to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes."[8] The United States Supreme Court has held that this purpose is legitimate and that a retaliatory tax rationally related to it does not violate Equal Protection.[9]

Texas' retaliatory tax, first enacted in 1935[10] and con-

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[6] *Id.* at 652-653, 101 S. Ct. 2070; *id.* at 654, 101 S. Ct. 2070 ("The Court has squarely rejected the argument that discriminatory state insurance taxes may be challenged under the Commerce Clause despite the McCarran-Ferguson Act." (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 414, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946), and *Prudential Ins. Co. v. Hobbs*, 328 U.S. 822, 66 S. Ct. 1360, 90 L. Ed. 1602 (1946) (per curiam))).

[7] *Id.* at 668, 101 S. Ct. 2070 (internal punctuation omitted).

[8] *Id.*

[9] *Id.* at 671-672, 101 S. Ct. 2070.

[10] Act of May 2, 1935, 44th Leg., R.S., ch. 307, § 1, 1935 Tex. Gen. Laws 713, 713-714 ("Whenever, by any law in force without this State, an insurance corporation . . . of this State or agent thereof is required to make any deposit of securities . . . or to make payment for taxes, fines, penalties, certificates of authority, valuation of policies, license fees, or otherwise, or any special burden is imposed, greater than is required by the laws of this State for similar foreign corporations or their agents, the insurance companies . . . of such States or governments shall be and they are hereby required as a condition precedent to their transacting business in this State, to make a like deposit for like purposes . . . and to pay . . . for taxes,

sistently applied until this case, falls squarely within the Supreme Court's holding. But in this case, the Comptroller has reinterpreted the statute as it applies to title insurers, multiplying the tax due and transforming it into a penalty on nonresident insurers doing business in Texas. This sudden departure from the settled application of the retaliatory tax was not prompted by any legislative revision of the statute or any change in retaliatory taxation in other states. The only apparent purpose for the Comptroller's new position is to generate revenue from nonresident title insurers simply because they are nonresident. In my view, the Comptroller has misconstrued the tax statute so that it now violates Equal Protection. Because the Court disagrees, I respectfully dissent.

When insurance is sold through an agent, the insurer and the agent share the premium revenue. For title insurance in Texas, the revenue division is set by the Commissioner of Insurance.[11] During the times material to

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fines, penalties, certificates of authority, valuation of policies, license fees and otherwise a rate equal to such charges and payments imposed by the laws of such other State upon similar corporations of this State and the agents thereof.") (amending former TEX. REV. CIV. STAT. art. 4758 (1925)), *repealed by* Act of May 28, 1945, 49th Leg., R.S., ch. 279, § 4, 1945 Tex. Gen. Laws 442, 445, *and by* Act of May 23, 1951, 52d Leg., R.S., ch. 491, § 4, 1951 Tex. Gen. Laws 868, 1093. The first retaliatory provision appears to have been enacted in 1909, but it referred only to different security deposit requirements in different states, not different taxes. Act approved Mar. 22, 1909, 31st Leg., R.S., ch. 108, § 29, 1909 Tex. Gen. Laws 192, 203, *formerly* TEX. REV. CIV. STAT. art. 4768 (1911), *then* TEX. REV. CIV. STAT. art. 4758 (1925).

[11] TEX. INS. CODE § 2502.054(b)(1)(B) ("This subchapter does not . . . prohibit a title insurance company from . . . arranging for a division of premiums with the agent as set by the commissioner . . . ."), *formerly* TEX. INS. CODE art. 9.30, § B(1) ("This Article may not be construed as prohibiting . . . a foreign or domestic title insurance company doing business in this state . . . from . . . making the ar-

this case, that division has been 15% to the insurer and 85% to the agent.[12] For decades, the retaliatory tax in Texas and other states has been determined by comparing the taxes on total premiums, not just the insurer's share. A few years ago, it is not clear exactly when, the Comptroller decided for the first time to compare other states' taxes on total premiums with Texas' tax on only the insurer's 15% share. Simply put, the Comptroller now takes the position that "total" means 100% in every other state and 15% in Texas.

Ordinarily, everything is bigger in Texas, and though "total" is now smaller here, taxes have increased. The Comptroller's "new math", as the Court refers to it, multiplies the retaliatory tax and discriminates against out-of-state insurers doing business in Texas. For example, suppose an insurer from a state with a 2% premium tax rate does business in Texas, where the rate is 1.35%. On a $1,000 premium, the total tax would be $20 in the other state and $13.50 in Texas. Requiring the out-of-state insurer to pay a $6.50 retaliatory tax on its Texas business equalizes the tax burden on the two insurers' business in each other's state. Each insurer and its respective agents would, together, pay $20 in taxes and collect $980 in revenue. But in the Comptroller's

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rangement for division of premiums with the agent as shall be set by the commissioner . . . .").

[12] *See* Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas § IV, P-23(f) ("During 2000, and thereafter until changed by the Commissioner, on all title insurance written by title insurance agents, the division of premiums between title insurance companies and title insurance agents shall be as follows: (1) title insurance companies shall receive 15% of each title insurance premium, and (2) title insurance agents shall receive 85% of each title insurance premium . . . ."), *adopted* 28 TEX. ADMIN. CODE § 9.1, *available at* http://www.tdi.state.tx.us/title/titlem4d.html #P-23.

view, the retaliatory tax is determined by the difference between the other state's $20 premium tax and the insurer's 15% share of Texas' $13.50 premium tax—$2.03—a difference of $17.97. Hence, the out-of-state insurer together with its respective agents pays $31.47 in taxes and collects $969.73 in revenue. The Comptroller's new math increases the out-of-state title insurer's tax burden merely because the insurer is out-of-state.

By artificially reducing the size of Texas' premium tax, the Comptroller's new position dictates that Texas impose retaliatory taxes even when insurers hail from states imposing lower premium taxes than Texas. Suppose an insurer from a state with a 1% premium tax does business in Texas. On a $1,000 premium, the Comptroller would compare the $2.03 insurer's share of the Texas tax to the $10 premium tax in the other state and assess a $7.97 surcharge. In essence, for purposes of applying the retaliatory tax, the Comptroller has reduced Texas' gross premiums tax rate by 85%, from 1.35% to 0.2025%. Virtually every other state taxes gross premiums, but none has so low a rate. The tax now applies to all out-of-state insurers doing business in Texas merely because they are not domestic companies. The retaliatory tax, thus construed, no longer operates to discourage excessive taxation in other states; it now operates to discourage foreign insurers from doing business in Texas.

The Comptroller's change in position transforms the retaliatory tax, long a means of equalizing tax burdens on domestic and foreign insurers doing business in Texas, into a penalty against out-of-state insurers. The Comptroller's new position is not based on any change in the law. The relevant statutory provisions have been materially the same for decades. The retaliatory tax statute imposes "a tax . . . on a foreign insurer if . . . the foreign insurer's state of organization . . . imposes a tax . . . on a

similar domestic insurer that is . . . more than the [tax] this state directly imposes on the foreign insurer."[13] The retaliatory tax must be "impose[d] and collect[ed] . . . in the same manner and for the same purpose" as the tax on the insurer in the other state.[14] These provisions, recodified in 2003,[15] were enacted in 1957[16] and derived from the

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[13] TEX. INS. CODE § 281.004(a) ("The comptroller shall impose and collect a tax or other charge or a prohibition or restriction on a foreign insurer authorized to engage in business in this state if: (1) the foreign insurer's state of organization by law imposes a tax or other charge or a prohibition or restriction on a similar domestic insurer that is or may be authorized to engage in business in that other state; and (2) the sum of the taxes or other charges, prohibitions, and restrictions imposed by that other state is more than the sum of the taxes or other charges, prohibitions, and restrictions that this state directly imposes on the foreign insurer.").

[14] *Id.* § 281.004(b) ("The comptroller shall impose and collect the tax or other charge, prohibition, or restriction under Subsection (a) in the same manner and for the same purpose as the foreign insurer's state of organization.").

[15] Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 1, 2003 Tex. Gen. Laws 3611, 3638-3641, 4138.

[16] Act of May 22, 1957, 55th Leg., R.S., ch. 396, § 1, 1957 Tex. Gen. Laws 1184, 1185 ("Whenever by the laws of any other state or territory of the United States any taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company organized in this State and licensed and actually doing business in such other state or territory which, in the aggregate are in excess of the aggregate of taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the Board of Insurance Commissioners of this State shall impose upon any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions . . . ."), *formerly* TEX. INS. CODE art. 21.46.

first retaliatory tax statute enacted in 1935.[17] The premium tax statute imposes a "tax . . . on all premiums from the business of title insurance",[18] "regardless of whether paid to a title insurance company or retained by a title insurance agent",[19] to be paid by the insurer.[20] These provisions, also recodified in 2003,[21] and amended in 2007,[22] were enacted in 1987[23] and derived from prior premium tax statutes, the first one dating to 1893.[24]

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[17] *Supra* note 10.

[18] TEX. INS. CODE § 223.003(a) ("An annual tax is imposed on all premiums from the business of title insurance. The rate of the tax is 1.35 percent of title insurance taxable premiums for a calendar year, including any premiums retained by a title insurance agent".).

[19] *Id.* § 223.005(a) ("Premiums received from the business of title insurance are subject to the tax under this chapter regardless of whether paid to a title insurance company or retained by a title insurance agent, with the tax being in lieu of the tax on the premiums retained by a title insurance agent.").

[20] *Id.* § 223.005(b) ("The state facilitates the collection of the premium tax on the premiums retained by a title insurance agent by establishing the division of the premiums between the title insurance company and title insurance agent so that the company receives the premium tax due on the agent's portion of the premiums and remits it to the state.").

[21] Act of May 22, 2003, 78th Leg., ch. 1274, §§ 1, 26(b)(4), 2003 Tex. Gen. Laws 3611, 3622-3624, 4139.

[22] Act of May 27, 2007, 80th Leg., R.S., ch. 932, § 3, 2007 Tex. Gen. Laws 3194, 3195 (amending Section 223.003(a), which previously read: "An annual tax is imposed on each title insurance company that receives premiums from the business of title insurance. The rate of the tax is 1.35 percent of the title insurance company's taxable premiums for a calendar year, including any premiums retained by a title insurance agent".).

[23] Act of June 1, 1987, 70th Leg., R.S., ch. 1073, § 22, 1987 Tex. Gen. Laws 3610, 3638-3640, *formerly* TEX. INS. CODE art. 9.59 §§ 1 ("Each title insurance company receiving premiums from the business of title insurance shall pay . . . an annual tax on those premiums . . . ."), 8(b) ("The premium tax is levied on all amounts defined to be pre-

The Comptroller argues that the premium tax on the agent's 85% share of premiums is not "directly impose[d]" on the insurer within the meaning of the retaliatory tax statute, even though the insurer must remit the tax. In furtherance of its view, the Comptroller in 2001 adopted a rule limiting an insurer's liability for the premium tax to the amount due on its share.[25] The Comptroller acknowledges that no one took this position in the forty years after the phrase "directly imposes" was

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mium . . . , whether paid to the title insurance company or retained by the title insurance agent . . . . The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.").

[24] Act approved May 11, 1893, 23d Leg., R.S., ch. 102, § 1, 1893 Tex. Gen. Laws 156. The premium tax statutes have been frequently amended, and codified over the years as TEX. REV. CIV. STAT. art. 5243e (1895) (taxing "gross premium receipts" of "every life, fire, marine, accident, or other insurance company"), TEX. REV. CIV. STAT. art. 7376 (1911), and TEX. REV. CIV. STAT. art. 7064 (1925). Article 7064 was amended by Act of May 29, 1981, 67th Leg., R.S., ch. 844, § 1, 1981 Tex. Gen. Laws 3212, 3212-3215 and later recodified as articles 4.10 (applicable to title insurance companies) and 4.11 of the Insurance Code. Act of May 31, 1981, 67th Leg., R.S., ch. 389, § 36, 1981 Tex. Gen. Laws 1490, 1780-1784. Article 4.10 was, in turn, amended by Act of May 30, 1983, 68th Leg., R.S., ch. 283, 1983 Tex. Gen. Laws 1367 and Act of May 24, 1985, 69th Leg., R.S., ch. 161, §§ 3-4, 1985 Tex. Gen. Laws 715, 716. Eventually, in 1987, separate provisions for title insurance were enacted and codified at art. 9.59. Act of June 1, 1987, 70th Leg., R.S., ch. 1073, §§ 22, 23, 1987 Tex. Gen. Laws 3610, 3638-3641. Currently, provisions for gross premium taxes on various kinds of insurance are found in Chapters 221 through 226 of the Insurance Code. Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 1, 2003 Tex. Gen. Laws 3611.

[25] 34 TEX. ADMIN. CODE § 3.831(4)(c) ("Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable for the tax if the insurer fails to remit the tax due on the agent's portion.").

adopted in the 1957 statute, or in the ten years after the premium tax imposition and collection provisions were detailed in 1987. The Comptroller's position not only discards a settled, decades-old application of statutory provisions frequently revisited and left substantively unchanged by the Legislature, it contradicts the purpose of a tax in place since at least 1935. This tax was based on the burden imposed by other states on the insurance industry and not on an artificial allocation of the tax burden between insurers and their agents.

The Court concludes that the Comptroller's reinterpretation of the statute is due deference under *Tarrant Appraisal District v. Moore*.[26] While an agency's initial interpretation of a statute "is not carved in stone",[27] an agency's decision to depart from a longstanding interpretation is entitled to "considerably less deference" unless the agency provides some reasonable explanation for the change.[28] This is particularly so where the agency's ear-

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[26] 845 S.W.2d 820, 823 (Tex. 1993) ("[C]onstruction of a statute by an administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.").

[27] *Rust v. Sullivan*, 500 U.S. 173, 186, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 863, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (an agency has ample latitude to adapt its rulings or policies to changing circumstances).

[28] *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981); *see Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991) (though an agency decision to reinterpret a statute is entitled to *Chevron* deference, such an interpretation is "less persuasive"); *Rust*, 500 U.S. at 187, 111 S. Ct. 1759 (the agency provided "reasoned analysis" to support its changed interpretation); *Flores v. Employees Ret. Sys.*, 74 S.W.3d 532, 544-545 (Tex. App.–Austin 2002, pet. denied) (an agency must explain a decision to depart from a longstanding policy); *City of El*

lier interpretation is accompanied by legislative acquiescence.[29]

But even if the Comptroller's interpretation of "directly imposed" were entitled to more serious consideration, the plain language of the rest of the statute makes clear that the new interpretation is unreasonable.[30] The statute clearly requires the Comptroller to make apples-to-apples comparisons. Section 281.004 instructs the Comptroller to impose and collect the retaliatory tax "in the same manner and for the same purpose" as the foreign insurer's state tax. The Court insists that the retaliatory tax focuses on the insurance company to the exclusion of agents, but it is myopic to view a tax on gross revenue as affecting only some of the participants in the business who must share that revenue. One cannot assume that insurers and agents in other states do not share premium revenues merely because Texas has a statute specifying how they must do so. Indeed, one must assume that insurers and agents expect to be paid and to share in premium revenue. If only the insurer's share of the Texas premium tax is to be considered, then

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Paso v. El Paso Elec. Co., 851 S.W.2d 896, 900 (Tex. App.–Austin 1993, writ denied).

[29] *See Stanford v. Butler*, 142 Tex. 692, 181 S.W.2d 269, 273 (1944) (contemporaneous construction of an act by those charged with its enforcement is "'worthy of serious consideration as an aid to interpretation, particularly where the construction has been sanctioned by long acquiescence. Although a contemporaneous or practical construction is not absolutely controlling, it has much persuasive force and is entitled to great weight in determining the meaning of an ambiguous or doubtful provision.'") (citations omitted).

[30] *Continental Cas. Co. v. Downs*, 81 S.W.3d 803, 807 (Tex. 2002) ("Construction of a statute by the agency charged with its enforcement is entitled to serious consideration only if that construction is reasonable and does not contradict the statute's plain language.") (citations omitted).

that share must be compared to the insurer's share of the premium tax in the other state. But by comparing only the insurer's share of the Texas premium tax to another state's undivided premium tax, the Comptroller imposes and collects the retaliatory tax in a different manner and for a different purpose than the other state in imposing and collecting its tax.

There is another equally important reason to reject the Comptroller's new interpretation: it makes no sense. In *Western & Southern*, the Supreme Court acknowledged that a state has a legitimate interest in promoting interstate commerce by "deterring other States from enacting discriminatory or excessive taxes."[31] But there is no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive. Texas' legitimate interests in deterring excessive taxation by other states are not served by retaliating whenever another state's industry-wide tax would exceed Texas' tax on some of the participants, or whenever another state employs a different accounting method for calculating and assessing premium taxes. Nor is it served by retaliating against states whose total premium taxes are lower than Texas'. Under the Comptroller's new construction, the retaliatory tax provisions have been transformed into a means for blatant and unapologetic discrimination against out-of-state insurers and parochial protectionism.

The Court asserts that "the Comptroller's interpretation is consistent with the statutory scheme developed by the Legislature",[32] but the fact is that the Comptroller and others who administered the retaliatory tax for decades thought a contrary interpretation was required

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[31] 451 U.S. at 668, 101 S. Ct. 2070.

[32] *Ante* at 639.

by the statute. The Court adds that "[t]he Comptroller did not develop this scheme independently as a revenue-raising plan",[33] but no other basis for the "scheme" has been advanced, and none is apparent. The Comptroller's sudden multiplication of the retaliatory tax cannot serve the legitimate state purpose of discouraging excessive taxation in other states because even when a state's tax rate is a fraction of the rate in Texas, insurers from that state must, in the Comptroller's view, pay a retaliatory tax.

I agree with the Court that whether other states may react in a way that is ultimately unfavorable to Texas insurers, or whether the Comptroller's position may have other "unforeseen or unintended results", is none of our business. But it is certainly our business to ensure that persons similarly situated are afforded the equal protection of the law guaranteed by the Fourteenth Amendment. The Court concludes that the retaliatory tax remains "an equalizer between similarly situated title insurers."[34] The Comptroller's treatment of Texas title insurers doing business in other states and out-of-state title insurers doing business in Texas is as equal as 15 is to 100.

I would hold that the Comptroller's position is not permitted by the text of the retaliatory tax statute or by the Fourteenth Amendment. Accordingly, I respectfully dissent.

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[33] *Ante* at 639.

[34] *Ante* at 637.

APPENDIX B

IN THE COURT OF APPEALS OF TEXAS, AUSTIN

NO. 03-04-00342-CV

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Appellants,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS AND GREGG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Appellees.

JUNE 3, 2005

Before Justices B.A. SMITH, PURYEAR and PEMBERTON.

DAVID PURYEAR, Justice.

First American Title Insurance Company and Old Republic National Title Insurance Company sell title insurance in Texas but are incorporated in other states. They are seeking to recover taxes they argue were unlawfully imposed upon them. Texas imposes a tax on the amount of premium collected from title insurance policies. In addition, foreign title insurance companies, like First American and Old Republic, are required to pay an additional tax if their states of origin impose financial burdens on Texas insurance companies selling title insurance in the foreign states that are higher than the finan-

cial burdens Texas imposes upon foreign insurance companies selling title insurance here. This additional tax is called a retaliatory tax.

Previously title insurance companies have been allowed to include 100% of the total premium tax paid as part of their imposed financial burden for the purpose of determining whether a retaliatory tax needs to be paid. However, the Comptroller changed this previous interpretation and concluded that, because insurance companies pay only 15% of the premium tax, insurance companies should include only 15% of the premium tax as part of their total imposed financial burden. Under this new interpretation, foreign title insurance companies will be required to pay significantly more in retaliatory taxes.

First American and Old Republic contend that the Comptroller's new interpretation is wrong and seek to recover taxes they claim were unlawfully assessed under the Comptroller's new interpretation.[1] The district court granted summary judgment in favor of the Comptroller, and we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

First American is a California-based title insurance company, and Old Republic is a Minnesota-based title insurance company. Title insurance companies ("insurers") are responsible for issuing title insurance policies, for insuring title risks, and for paying claims and providing defenses to claims if necessary. Both First American and Old Republic engage in title insurance business within the State of Texas.

First American issues title policies through title agents and through direct operations. Old Republic is-

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[1] Both First American and Old Republic filed suits seeking to recover taxes they had paid. After the district court granted summary judgment in favor of the Comptroller, both cases were consolidated into this appeal.

sues title policies through title agents alone. Title agents are legal entities, such as corporations, that are separate from insurers and that are licensed to close real estate title insurance transactions on behalf of one or more insurers. Title agents may be affiliated with an insurer or may be completely independent. If an insurer becomes licensed as a direct operator, then it may close insurance transactions on its own without an agent.

Article 9.59 of the insurance code ("the premium tax statute") requires title insurers to remit to the state a tax on insurance premiums collected while engaged in business in Texas. *See* Tex. Ins. Code Ann. art. 9.59 (West Supp. 2004-05), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005). In addition, article 21.46 of the insurance code ("the retaliatory tax statute") requires the imposition of an additional tax on foreign insurers doing business within Texas if the foreign state imposes financial burdens on Texas-based insurers doing business in the foreign state that are higher than the financial burdens Texas places on the foreign state's insurers doing business here. *See* Tex. Ins. Code Ann. art. 21.46 (West Supp. 2004-05), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005). The principal purpose of a retaliatory tax law is to facilitate the ability of insurers to conduct business across state lines by deterring states from enacting discriminatory or excessive taxes against foreign insurers. *See Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 668, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

In the late 1990s, the Comptroller took the position that the premium tax statute required title insurance agents to pay a portion of the premium taxes due and that the payment of title insurance premium taxes is not solely the obligation of insurers. Previously, insurers had

been allowed to include 100% of the premium tax paid as the insurers' tax burden for the purposes of determining whether a retaliatory tax would be imposed on an insurer. Under the new calculation method, an insurer may only count 15% of the premium tax as its financial burden when determining the amount of retaliatory taxes due, if any.

After auditing First American's 1998-2001 insurance tax reports, the Comptroller assessed a fee of $175,383.77 in retaliatory taxes and interest against First American for the 2001 tax year,[2] which First American paid in March 2003 under protest. In addition, First American paid, under protest, $1,257,196.99 in retaliatory taxes for 2002. Similarly, after an audit, the Comptroller assessed retaliatory taxes against Old Republic. Old Republic paid, under protest, $219,626.40 as retaliatory taxes for 2002.

PROCEDURAL HISTORY

Appellants filed separate lawsuits against the Comptroller and the Attorney General of Texas (cumulatively the "Comptroller") to recover what they claim were unlawfully assessed retaliatory taxes that were paid under protest. The appellants and the Comptroller both filed cross-motions for summary judgment in the separate cases, which the trial court heard simultaneously. The trial court granted summary judgment in favor of the Comptroller in both cases. Both appellants appealed the decision of the trial court, and the two cases were consolidated into this appeal.

STANDARD OF REVIEW

The standards for review of a traditional summary judgment are well established: the movant must show that there is no genuine issue of material fact and that it

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[2] The tax years of 1998-2000 are not at issue in this case.

is entitled to judgment as a matter of law; in deciding whether there is a disputed material fact issue precluding summary judgment, the court must take evidence favorable to the nonmovant as true, and the court must indulge every reasonable inference in favor of the nonmovant and resolve any doubts in the nonmovant's favor. *Sergeant Enters., Inc. v. Strayhorn*, 112 S.W.3d 241, 245 (Tex. App.–Austin 2003, no pet.) (citing *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985)). We review the trial court's decision to grant summary judgment de novo. *Id.* (citing *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994)).

Generally, a party cannot appeal the denial of a motion for summary judgment because it is an interlocutory order and, thus, not appealable. *Id.* (citing *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996)). However, when both parties move for summary judgment and the district court grants one motion and denies the other, the unsuccessful party may appeal both the grant of the prevailing party's motion and the denial of its own. *Id.* (citing *Holmes v. Morales*, 924 S.W.2d 920, 922 (Tex. 1996)). In such a case, we will review the summary judgment evidence offered by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Id.* (citing *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000); *Commissioners Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997)). Because the district court did not state the basis for granting summary judgment, the appellants must negate all grounds that support the judgment. *Id.* (citing *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 381 (Tex. 1993)). However, if the appellants fail to negate each ground on which the judgment may have been rendered, we must uphold the summary judgment. *Id.* (citing *Carr*, 776 S.W.2d at 569).

This case involves interpreting the title insurance premium tax statute and the retaliatory tax statute, and, therefore, we apply a de novo standard. *Lopez v. Texas Workers' Comp. Ins. Fund*, 11 S.W.3d 490, 494 (Tex. App.–Austin 2000, pet. denied) (citing *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989)). When construing a statute, the court must construe the statute as written and must, if possible, determine the legislature's intention from the language that was used in the statute. *Del Indus., Inc. v. Texas Workers' Comp. Ins. Fund*, 973 S.W.2d 743, 745 (Tex. App.–Austin 1998), *aff'd*, 35 S.W.3d 591 (Tex. 2000). When determining legislative intent, the entire act, not isolated portions of the act, must be considered. *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998). Courts should first look to the plain meaning of the words in the statute and, if the meaning is unambiguous, interpret the statute so that it comports with the plain meaning expressed. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). Every word, phrase, and expression used in a statute should be read as if it were deliberately used. *See Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869, 873 (Tex. App.–Austin 2002, pet. denied). If two statutes are in pari materia or address the same subject, then an effort should be made to harmonize and give effect to both statutes. *Breeding v. State*, 762 S.W.2d 737, 739 (Tex. App.–Amarillo 1988, pet. ref'd) (citing *Cheney v. State*, 755 S.W.2d 123 (Tex. Crim. App. 1988)).

When enacting a statute, the legislature is presumed to have intended to comply with both the state and the federal constitutions. *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990). Therefore, when construing a statute, courts should interpret a statute so that the statute's meaning is consistent with all constitutional requirements if possible. *Id.* In addition, when an administrative agency is charged with a statute's en-

forcement and also construes the statute, the agency's construction of the statute is entitled to serious consideration as long as the construction is reasonable and does not contradict the plain meaning of the statute. *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

STATUTORY FRAMEWORK

Before addressing the merits of the appellants' claims, it will be helpful to describe the statutory scheme in question in this case and the Comptroller's current interpretation of it. In 1907, the legislature first imposed a title insurance premium tax upon insurers. *See* Act of May 16, 1907, 30th Leg., 1st C.S., ch. 18, § 8, 1907 Tex. Gen. Laws 479, 482. In 1987, the insurance premium tax statutes were amended. Act of June 17, 1987, 70th Leg., R.S., 1987 Tex. Gen. Laws 3610, 3638-40 (codified as Tex. Ins. Code Ann. art. 9.59). As part of the amendment, a provision calling for the division of premium between insurers and title agents and a provision requiring insurers to obtain an agent's portion of the premium tax and to remit it to the state were added. *Id.* The relevant portions of the premium tax statute read as follows:

> Sec. 1. Each title insurance company receiving premiums . . . shall pay to the Comptroller a tax on those premiums . . . .
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> Sec. 2. In this article premium means the total amount of premiums received for the taxable year on title insurance written on property located in this state . . . .
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> Sec. 4. There is imposed on all premium on title insurance an annual tax equal to 1.35 percent.
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> Sec. 5. Each title insurance company that is liable under this article to remit tax on premium shall file a tax return annually . . . .

. . . .

> Sec. 8(a) Title insurance companies and title insurance agents *subject to the tax levied by this article may not be required to pay any additional tax in proportion to their gross premium receipts* levied by this state or any county or municipality except as otherwise provided by this code and the Labor Code . . . .
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> (b) The premium tax is levied on all amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent, such tax being in lieu of the tax on the premium retained by the agent. The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent *so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.*

Tex. Ins. Code Ann. art. 9.59 (West Supp. 2004-05) (emphasis added).

The premium tax statute exempts title agents, which are subject to taxation under the statute, from paying an *additional* tax based on gross premium receipts. *Id.* § 8(a). In addition to the section 8(a) exemption, section 171.052 of the Texas Tax Code exempts agents and insurers from franchise taxes because both are required to pay a tax based on gross premium receipts. Tex. Tax Code Ann. § 171.052 (West Supp. 2004-05). Specifically, section 171.052 provides as follows:

> An insurance organization, title insurance company, or title insurance agent authorized to engage in insurance business in this state now required to pay an annual tax under Chapter 4 or 9, Insurance

> Code, measured by its gross premium receipts is exempted from the franchise tax . . . .

Id.

The premium tax statute also states that premiums collected are divided between insurers and agents in such a way that insurers receive the agents' shares of the premium tax in the amount collected from the agents. Tex. Ins. Code Ann. art. 9.59 § 8(b). How the premium is divided between insurers and agents and what premium rates are charged are both questions decided by the Texas Department of Insurance (the "Department"). *See* Tex. Ins. Code Ann. arts. 9.07(b), (c) and 9.30(B)(1) (West Supp. 2004-05). In determining reasonable premium rates, the Department is required to consider all relevant income and expenses of title agents and insurers. *Id.* art. 9.07(b), (c). Between 2001 and 2002, the time period in issue in this case, the Department allowed title agents to keep 85% of the premiums collected from policyholders and required title agents to remit 15% of the premiums to title insurers.[3] 28 Tex. Admin. Code § 9.1 (2004) (adopting Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in Texas) (*available at* www.tdi.state.tx.us/company/titlem4d.html#P-23).

In addition to paying premium taxes, insurers from a foreign state doing business in Texas may be required to pay a retaliatory tax. The retaliatory tax statute imposes an additional tax upon a foreign insurer doing business in the state of Texas if the foreign state imposes financial burdens on Texas-based insurers doing business in the foreign state that are higher than the financial burdens Texas places on the foreign state's insurers doing busi-

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[3] In this appeal, we are not faced with and do not address whether the specific division of premium between agents (85%) and insurers (15%) is reasonable.

ness in Texas. The relevant portion of the retaliatory tax statute reads as follows:

> Whe[never] by the laws of any state or territory of the United States any taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the comptroller shall impose upon and collect from any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions; provided, however, the aggregate of taxes, licenses, fees, fines, penalties or other obligations imposed by this State pursuant to this Article on an insurance company of another state or territory shall not exceed the aggregate of such charges imposed by such other state or territory on a similar insurance company of this State that may be licensed and doing business.

Tex. Ins. Code Ann. art. 21.46 § 1(a).

Under the terms of the retaliatory tax statute, foreign insurers are required to file a report for the purpose of determining whether a retaliatory tax needs to be assessed against the insurers. *Id.* § (1)(d). Instructions for the Texas Title Agent Statistical Report, which is issued

by the Department and is filed with the Commissioner of Insurance, require insurers to list premiums collected and various expenses imposed upon them. Although insurers had previously been allowed to include 100% of the premium tax in the retaliatory tax calculation, the Comptroller changed the previous interpretation of the retaliatory tax scheme, which she may do as long as the new interpretation does not contradict either statutory language or a formally promulgated rule. *See Moore*, 845 S.W.2d at 823 (agency's construction of statute entitled to deference as long as does not contradict statutory language); *Grocers Supply Co., Inc. v. Sharp*, 978 S.W.2d 638, 642 (Tex. App.–Austin 1998, pet. denied) (Comptroller's informal change in policy of how rule enforced did not "informally contravene the express terms of a formally promulgated rule."). Under the new interpretation, insurers are allowed to include only 15% of the premium tax for the purpose of determining the amount of retaliatory taxes, if any, to be paid.

When developing the new interpretation of the retaliatory tax scheme in which agents share responsibility for paying premium taxes, the Comptroller relied upon the fact that agents are exempt from paying franchise taxes or "additional" premium taxes. *See Gables Realty Ltd. P'ship*, 81 S.W.3d at 873 (statutes should be construed to give meaning to every word). Further, the Comptroller reasoned that because section 8(b) of the premium tax statute specifies that insurers receive the agents' portion of the premium tax due when the premium is divided among the agent and the insurer and because the Department has specified that title agents are to transfer 15% of the premium collected to the insurers, then only 15% of the premium tax is directly imposed on the insurer. Therefore, the insurer should only be allowed to include 15% of the premium tax for the purposes of cal-

culating a retaliatory tax. *See* Tex. Ins. Code Ann. art. 9.59 § 8(b).

After adopting this new interpretation, the Comptroller, in 1996, instituted a policy that makes title agents responsible to the Comptroller for any portion of premium tax that is not remitted to insurers. *See* Tex. Ins. Code Ann. art. 9.59 § 3(c) (allowing Comptroller to create rules, limitations, minimum standards, and regulations that are fair, reasonable, and appropriate). This policy limited the insurers' obligation to remit premium tax actually collected if an insurer can prove that the title agent did not remit the portion of the premium the agent is required to give to the insurer. In 2000, the policy was published on the Internet based State Tax Automated Research System. *See* Texas Comptroller of Public Accounts, Star System No. 200009751L *available at* http://aixtcp.cpa.state.tx.us/star.

In addition, in 2001, the Comptroller amended rule 3.831, describing agents' and insurers' responsibilities for paying premium taxes. Under the amended rule, insurers are instructed to collect the premium tax due on the agents' portion of the premium and remit to the Comptroller both the agents' and the insurers' portions of the premium tax. *See* 34 Tex. Admin. Code § 3.831(4)(B), (D) (2004) (Insurance Tax: Gross Premiums Definitions . . . and Clarification of the Taxation on the Distribution of Title Premiums). Further, section 3.831(4)(C) holds agents and insurers separately liable for their share of the premium tax. *Id.* § 3.831(4)(C). Specifically, section 3.831(4)(C) reads as follows:

> Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable if the insurer fails to remit the tax due on the agent's portion.

Id.

DISCUSSION

On appeal, the appellants make the following three claims: (1) foreign-based insurers are entitled to include 100% of the premium taxes paid to the state of Texas in its calculation of the amount of retaliatory taxes owed; (2) agents do not, in fact, bear legal responsibility to pay 85% of the premium tax; and (3) the Comptroller's new interpretation of the retaliatory tax scheme is unconstitutional. For ease of reading, we will combine appellants' first two points.

The Comptroller's Interpretation is Reasonable

Appellants contend that the Comptroller's interpretation of the retaliatory tax scheme is incorrect. First, appellants assert that insurers are solely responsible for paying 100% of the premium tax and, similarly, assert that the obligation to pay premium taxes is not imposed on agents. In support of their assertions, appellants point to section 111.016(a) and (b) of the tax code for the proposition that insurers will still have to pay 100% of the premium tax if agents do not transfer 15% of the premium to insurers. *See* Tex. Tax Code Ann. § 111.016(a), (b) (West 2001). Section 111.016(a) states, in relevant part, that "any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and is liable for the full amount collected plus any accrued penalties and interest on the amount collected." *See* Tex. Tax Code Ann. § 111.016(a). Section 111.016(b) states, in relevant part, that "an individual who controls or supervises the collection of tax or money from another person . . . and who willfully fails to pay or cause to be paid the tax or money is liable as a responsible individual for an amount equal to the tax or money not paid or caused to be paid." *See* Tex. Tax Code Ann. § 111.016(b).

However, neither of these sections state that an insurer would be liable for the full amount of premium tax if agents do not turn over their share of the premium tax. Further, subsection (a) states that the person has to receive the tax in question in order to be held liable for the amount in question, and subsection (b) states that the responsible party must have willfully refused to pay the tax collected on behalf of another. Neither of these scenarios address the situation of agents refusing to turn over their portion of the premium tax to insurers.

As further support for the assertion that there is no premium tax imposed on agents, appellants point to the first sentence of section 8(b) of the premium tax statute, which states that "[t]he premium tax is levied on all amounts defined to be premium . . . whether paid to the title insurance company or retained by the . . . agent, such tax being in lieu of the tax on the premium retained by the agent . . . ." Tex. Ins. Code Ann. art. 9.59 § 8(b). However, this sentence must also be read along with the last sentence of section 8(b), which states that the insurer receives the agent's portion of the premium tax due when the premium is divided between the agent and the insurer. *See id.* When read together, the "in lieu of" provision means that one comprehensive tax is formulated based on the total amount of premium with insurers collecting that portion of the premium that includes the agent's portion of the premium tax. *See Jones*, 969 S.W.2d at 432 (entire act, not isolated parts, must be considered). Although the statute requires title insurers to remit all of the premium tax to the Comptroller, the statute does not place all of the financial burden on the insurer.

Appellants also argue that the Comptroller's erroneous interpretation of the retaliatory tax scheme in which agents are responsible for paying 85% of the premium tax is based, in part, on an incorrect and isolated reading of section 8 of the premium tax statute, which contains

the following language: "Title insurance companies and title insurance agents *subject to* the tax levied by this article . . . ." Tex. Ins. Code Ann. art. 9.59 § 8(a) (emphasis added). Appellants claim that agents can be "subject to" paying a tax without actually having to pay a tax. Further, appellants urge that, rather than meaning a tax must be paid, the phrase "subject to" in section 8(a) means to bring under dominion, control, or authority. *See Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 298-99 (Tex. App.–Austin 2001, no pet.) (court construed statute to mean taxpayer "subject to" taxation if there was possibility that state might impose taxation, not if individual actually required to pay tax). From this assertion, appellants contend that agents are subject to taxation because a tax could be legally imposed on agents but is not, and appellants insist that section 8 is only an exclusionary provision exempting insurers and agents from other taxes but does not impose taxes on anyone. However, the premium tax statute contradicts appellants' assertion that agents are not responsible for paying any portion of the premium tax by stating that taxes on agents' portions of the premium collected are included within the portions transferred from agents to insurers after the premium has been divided. Tex. Ins. Code Ann. art. 9.59 § 8(b); *see also City of San Antonio*, 111 S.W.3d at 25 (if meaning unambiguous, statute should be interpreted to comport with that meaning).

In addition, appellants insist that the Comptroller's interpretation of the retaliatory tax scheme, under which both agents and insurers are liable for premium taxes, leads to absurd conclusions and unjust discrimination against foreign insurers, and, therefore, the previous interpretation should be reimplemented. *See Cramer v. Sheppard*, 140 Tex. 271, 167 S.W.2d 147, 155 (Tex. 1942) (statutory provisions will not be interpreted in way that leads to "absurd conclusions, great public inconvenience,

or unjust discrimination" if another interpretation can reasonably be made). Appellants assert that, because insurers bear the responsibility to remit 100% of the premium tax to the state, the premium tax is a tax "directly imposed upon" insurers as described in the retaliatory tax statute. *See* Tex. Ins. Code Ann. art. 21.46 (requiring, for purposes of calculating retaliatory taxes, comparison of obligations imposed on foreign insurers doing business in Texas with obligations imposed on Texas insurers doing business in foreign state). Appellants contend that there is no statute or formal rule that would excuse a title insurer from having to pay the full premium tax if an agent does not remit 15% of the total premiums collected to the insurer and contend that the Comptroller has no statutory authority to collect premium from agents in the event that an agent fails to transfer the premium to an insurer; therefore, appellants insist insurers will be held liable for the full amount of premium taxes regardless of whether agents transfer the premium or not. Further, appellants assert that if insurers do not pay 100% of the premium tax due because an agent has not transferred the premium, they will be subject to a collection proceeding for the amount not paid, and the Department may revoke its license to transact business in Texas. *See* Tex. Ins. Code Ann. arts. 9.59 § 9 ("A title insurance company failing to pay all taxes imposed by this article is subject to Article 4.05 of this code."); 4.05 (West Supp. 2004-05) (authorizing collection proceeding to collect taxes due on unreported gross premium receipts), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005); 9.28 (West 1981) (authorizing revocation of certificate of authority to transact business if insurer does not comply with provisions of insurance code), *repealed by* Act of April 30, 2003, 78th Leg., R.S., ch. 1274, § 26(b)(4), 2003 Tex. Gen. Laws 3611, 4139 (effective April 1, 2005).

Appellants assert that allowing insurers to include only 15% of the premium tax in the retaliatory tax calculation even though the insurers will be responsible for the full amount and may be subjected to the sanctions listed above is discriminatory and absurd.

However, as mentioned, the Comptroller amended rule 3.831 to codify the new interpretation that agents are proportionally liable for premium taxes. 34 Tex. Admin. Code § 3.831(4)(C). In addition, the Comptroller published a policy providing insurers a defense to being held responsible for all premium taxes if an agent does not remit its share of the premium tax due. The Comptroller's interpretation, the amended rule 3.831, and the Comptroller's published policy protect insurers from being responsible for the full amount of premium taxes if the agent does not remit its portion of the premium tax. The Comptroller's interpretation, policy, and rule do not lead to absurd conclusions or unjust discrimination; on the contrary, they protect insurers from being unfairly held liable for taxes they do not pay or owe.

Alternatively, appellants argue that, even if agents are responsible for 85% of the tax, then the duty to remit 100% of the premium tax to the state qualifies as an "other obligation . . . directly imposed" on insurers under article 21.46, and, therefore, 100% of the premium tax should be included in the retaliatory tax calculation. *See* Tex. Ins. Code Ann. art. 21.46. Appellants assert that the phrase "other obligations" as listed in article 21.46 focuses on obligations that are directly imposed on an insurer, not on who bears the monetary burden, and extends beyond the legal liability for the tax and includes the obligation to remit the tax to the state. *See* Tex. Tax Code Ann. § 101.003(11) (West 2001) (obligation is "the duty of a person to pay a tax, fee, assessment, or other amount").

However, administrative duties to remit taxes collected from another entity without financial implications that can be quantified are not the type of "other obligations" that need to be included when performing the retaliatory calculation to determine what retaliatory taxes, if any, should be assessed. On the contrary, because all the other obligations listed before the phrase "other obligations" refer to financial obligations, the rule of ejusdem generis implies that the phrase "other obligations" also refers to obligations that have financial, not ministerial, implications.[4] *See Hilco Elec. Coop. v. Midlothian Butane Gas Co., Inc.*, 111 S.W.3d 75, 81 (Tex. 2003) (rule of ejusdem generis "provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.").

Contrary to the appellants' assertions, the Comptroller's new interpretation and rule 3.831 do not impose additional restrictions, conditions, or burdens that are inconsistent with either the retaliatory tax statute or the premium tax statute. *See Hollywood Calling v. Public Util. Comm'n of Tex.*, 805 S.W.2d 618, 620 (Tex. App.–Austin 1991, no writ) (rule "may not impose additional burdens, conditions, or restrictions beyond or inconsistent with the statutory provisions."). Rule 3.831(4)(C) does not directly contradict any statutory language because the premium tax statute states that an agent's portion of the premium tax is included within the division of premium transferred to the insurer, here 15%. In addition, the retaliatory tax statute only requires inclusion of

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[4] Because the Department is required to consider insurers' relevant expenses for the purposes of setting premium rates, we will presume that the Department accounted for the obligation of remitting agents' portions of the premium tax.

financial obligations "directly imposed" on an insurer. Further, the new interpretation and the rule do not run counter to the general objectives of the retaliatory tax statute or impose any burdens that are in excess of or inconsistent with the statute. The retaliatory tax statute is designed to equalize burdens imposed on Texas-based insurers by foreign states and the burdens imposed by Texas on foreign-based insurers. The rule and the Comptroller's new interpretation make insurers responsible for the portion of premium taxes they actually pay. Including what the insurers are actually responsible for in the retaliatory tax equation does not contravene the objectives of the statute; on the contrary, it actually enforces the objectives. The fact that insurers may have to pay more as retaliatory taxes than was required before as a result of including only the amount insurers actually pay in premium taxes does not impose an additional tax in excess of statutory objectives. Rather, the new interpretation and rule impose the burden contemplated by the retaliatory tax statutory scheme. Enacting this rule and adopting the Comptroller's new reasonable interpretation of the retaliatory tax scheme, which facilitate the purpose of the retaliatory tax scheme, were not, as suggested by the appellants, abuses of discretion. *See Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd. of the Tex. Dep't of Transp.*, 156 S.W.3d 91, 102 (Tex. App.–Austin 2004, pet. filed) (when determining whether agency abuses its discretion, court must ascertain whether agency "based its decision on legally irrelevant factors or failed to consider legally relevant factors.").

The Comptroller's interpretation, policy, and rule stating that insurers are not responsible for the full 100% of the tax because agents give insurers their share of the tax when they give an insurer 15% of the premium collected are reasonable and do not conflict with the plain meaning of either the retaliatory or premium tax stat-

utes. On the contrary, they specify exactly what section 8(b) of the premium tax statute requires: the insurer receiving "the premium tax due on the agent's portion" through the division of premium between agents and insurers. Accordingly, we overrule appellants' first two issues on appeal.

Comptroller's Application of Retaliatory Tax Statute is Constitutional

In addition to arguing that the Comptroller's new interpretation is incorrect, appellants also assert that the Comptroller's application of the retaliatory tax is unconstitutional because it violates the equal protection clause. Specifically, appellants insist that the retaliatory taxes imposed under the Comptroller's new interpretation unlawfully raise revenue for the state at the expense of foreign insurers, exceed the "relatively modest" amount of revenue raised under the California retaliatory tax scheme found constitutional in *Western and Southern Life Insurance*, and do not serve the purpose of promoting the interstate business of domestic insurers by deterring other states from enacting discriminatory taxes. *See Western & S. Life Ins. Co.*, 451 U.S. at 668-72, 101 S. Ct. 2070; *see also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985) (state may not impose "discriminatorily higher taxes on nonresident corporations solely because they are nonresidents."). Appellants urge the court to interpret Article 21.46 as requiring insurers to include 100% of the premium tax paid in the retaliatory tax calculation in order to avoid the alleged constitutional infirmities. *See Brady*, 795 S.W.2d at 715; Tex. Gov't Code Ann. § 311.021(1) (West 2005); *Ex parte Elliott*, 973 S.W.2d 737, 742 (Tex. App.–Austin 1998, pet. ref'd).

Alternatively, if the court determines that the Comptroller's interpretation is the only permissible interpretation, appellants contend the court should declare the

entire retaliatory tax statute unconstitutional because it imposes retaliatory taxes on foreign-title insurers that exceed the aggregate tax burden that would be imposed on a comparable Texas insurer doing business in the foreign state.[5]

The equal protection clause of the United States Constitution forbids states from denying to any person located within the jurisdiction of the states equal protection of the law. *See id.* at 656-57, 101 S. Ct. 2070. Similarly, the Texas Constitution also guarantees equal rights to all persons. Tex. Const. art. I, § 3. When determining whether a tax is unconstitutional, courts must look to the substance of the tax and not the form of the tax. *See Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 509-10, 47 S. Ct. 179, 71 L. Ed. 372 (1926) (court must regard substance not form for determining whether tax constitutional, and test is "in the operation and effect of the law as applied and enforced by the state" (quoting *St. Louis Southwestern Railway Co. v. State of Arkansas ex rel. Norwood*, 235 U.S. 350, 362, 35 S. Ct. 99, 59 L. Ed. 265 (1914))). Based on this premise, appellants insist that, regardless of whether the insurer or the agent is technically liable for the 85% of the premium tax, the Comptroller's interpretation imposes financial burdens on foreign insurers doing business in Texas that greatly exceed the financial burdens imposed on Texas insurers in the foreign state. Specifically, appellants contend that, because insurers will be allowed to include only 15% of the

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[5] Additionally, appellants insist that the Comptroller's interpretation would cause other states to retaliate against Texas-based insurers, which would be detrimental to both foreign and domestic insurers. However, it is not within the purview of this court to consider what other states may or may not do as a result of the Comptroller adopting this new interpretation. It is for the legislature, not the courts, to consider the possibility of other states' reactions when enacting legislation.

premium tax in the retaliatory tax calculation, foreign insurers will have to pay the difference between 15% of the premium tax imposed by Texas and the *total* premium tax the foreign state imposes, which would lead to foreign insurers paying significantly larger taxes than a comparable Texas insurer engaged in business in the foreign state.

However, we do not agree with the appellants' characterization of the Comptroller's interpretation. Because the Texas retaliatory statute applies only to foreign insurers, the equal taxation test applicable to retaliatory taxes requires a determination of whether the distinction between foreign and domestic insurers is rationally related to a legitimate government purpose. *Western & S. Life Ins. Co.*, 451 U.S. at 657, 101 S. Ct. 2070.[6] Generally speaking, retaliatory taxes are constitutional and raise minimum amounts of revenue. *Id.* at 669-70, 101 S. Ct. 2070. Retaliatory taxes are applied to foreign insurers for the purpose of deterring other states from imposing excessive taxes against domestic insurers, or alternatively, to compensate for higher out-of-state tax obligations imposed on Texas insurers, which serves a legitimate governmental purpose. *Id.* at 668-72, 101 S. Ct. 2070.

Under the Comptroller's interpretation of the retaliatory tax scheme, title agents remit 85% of the premium tax to title insurers. Appellants assert that by allowing foreign insurers to include only 15% of the premium tax in the retaliatory tax calculation, the Comptroller is imposing retaliatory taxes on foreign-title insurers that exceed the aggregate financial burden imposed on com-

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[6] Contrary to appellants' assertions, the test of the constitutionality of a retaliatory tax is not whether a retaliatory tax has increased or decreased over time, nor is the test whether the tax raises revenue. All taxes raise revenue, including the previous retaliatory tax statute.

parable Texas insurers doing business in the foreign state. The Comptroller's interpretation allows foreign insurers selling title insurance in Texas to include only the portion of the premium tax they actually pay in the retaliatory tax calculation. It compares a foreign title insurer's aggregate financial obligations in Texas to a Texas insurer's aggregate financial obligations in a foreign state; it then requires a retaliatory tax from a foreign-based insurer only if its Texas counterpart pays more in the foreign state, and requires, as payment in retaliatory taxes, the amount that would equalize the financial burdens on foreign insurers doing business in Texas and Texas insurers doing business in the foreign state. Accordingly, the Comptroller's interpretation serves the legitimate state purpose of deterring other states from imposing excessive taxes against Texas insurers. Therefore, both the retaliatory tax statute and the Comptroller's application of the retaliatory tax scheme are constitutional. *Compare Western & S. Life Ins. Co.*, 451 U.S. at 674, 101 S. Ct. 2070 (California retaliatory tax statute constitutional), with *Ward*, 470 U.S. at 878, 882, 105 S. Ct. 1676 (statute unconstitutional that gave domestic companies preferential treatment and burdened all foreign corporations regardless of what foreign states did).

Appellants further insist that because the Comptroller's current interpretation of article 9.59 has not been consistently and uniformly applied by the Comptroller, then the Comptroller's current interpretation is not entitled to judicial deference, and the Comptroller should be required to return to the previous interpretation. *See Texas Citrus Exch. v. Sharp*, 955 S.W.2d 164, 170 (Tex. App.–Austin 1997, no pet.) (courts do not defer to administrative construction that deviates from clear and express provisions of statutory scheme, and courts give greater deference to agency interpretation that is long-

standing and applied uniformly). However, just because the Comptroller uniformly enforced a statute until a certain date and then uniformly enforced the statute in a different manner does not mean there is a constitutional violation, especially where, as the Comptroller asserts, all the taxpayers have been treated equally since the new interpretation was adopted. *See generally Grocers Supply Co., Inc. v. Sharp*, 978 S.W.2d 638 (Tex. App.–Austin 1998, pet. denied). In the Comptroller's summary judgment evidence, she demonstrated that the new instructions have been consistently applied to audits conducted since 2000, which includes report years since 1996.

Further, taxpayers do not acquire a right to pay less in taxes because they have been charged lower taxes in the past or because a tax policy was incorrectly implemented. *See id.* (Comptroller changed previous interpretation of tax statute, and grocery store applied for refund of sales taxes previously paid; however, Comptroller changed interpretation of tax statute back to previous interpretation, and court held grocery store not entitled to refund). Past omissions by the Comptroller will not serve as a bar to the Comptroller enforcing the statute and from imposing the correct financial obligation on title insurers. *See Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex. 1991) (Comptroller did not enforce part of franchise tax statute for thirteen years, but supreme court held prior non-enforcement could not prevent Comptroller from properly collecting taxes due as required by statute).

Title insurers are financially obligated to pay 15% of the tax due on premiums. This requirement is mandated by the premium and retaliatory tax statutes and by the Comptroller's interpretation of these statutes. Requiring insurers to include only the 15% of the premium tax they actually pay does not render the retaliatory tax scheme unconstitutional. Because we conclude that the retalia-

tory tax statutory scheme and the Comptroller's application of it are constitutional, we overrule appellants' third issue on appeal.

CONCLUSION

The Comptroller's interpretation of the premium tax and retaliatory tax scheme is reasonable and does not contradict the plain meaning of either the retaliatory tax or the premium tax statutes. Further, the Comptroller's application of the two statutes is constitutional. Accordingly, the district court did not err in granting the Comptroller's motion for summary judgment and in denying appellants' motion for summary judgment. Therefore, we overrule appellants' three claims and affirm the judgment of the district court.

APPENDIX C

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
201st JUDICIAL DISTRICT

NO. GN 301692

FIRST AMERICAN TITLE INSURANCE COMPANY.
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

SUMMARY JUDGMENT

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on May 17, 2004.

/s/
Judge Presiding

APPENDIX D

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

No. GN 301693

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

SUMMARY JUDGMENT

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on May 17, 2004.

/s/
Judge Presiding

APPENDIX E

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
201st JUDICIAL DISTRICT

CAUSE NO. GN 301692

FIRST AMERICAN TITLE INSURANCE COMPANY,
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

JUDGMENT NUNC PRO TUNC

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on June 14, 2004.

/s/
Judge Presiding

APPENDIX F

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

CAUSE NO. GN 301693

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Plaintiff,

v.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Defendants.

JUDGMENT NUNC PRO TUNC

The Court, having heard Defendants' Motion for Summary Judgment, is of the opinion that it is meritorious and should be granted.

It is ORDERED that Defendants' Motion for Summary Judgment is granted with respect to all issues and claims. It is ORDERED that Plaintiff's Motion for Summary Judgment is denied with respect to all issues and claims.

Signed on June 14, 2004.

/s/
Judge Presiding

APPENDIX G

THE SUPREME COURT OF TEXAS

Orders Pronounced August 29, 2008

ORDERS ON CAUSES

* * * * *

THE MOTIONS FOR REHEARING OF THE FOLLOWING CAUSES ARE DENIED:

05-0541 FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY v. SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF TEXAS; from Travis County; 3rd district (03-04-00342-CV, 169 SW3d 298, 06-03-05)

corrected opinion issued

* * * * *

APPENDIX H

RELEVANT STATUTORY PROVISIONS

1. Article 9.59 of the former Texas Insurance Code (2004) (current version at Tex. Ins. Code §§ 223.001-.011) provided as follows:

Title Insurance Companies; Tax on Premiums

Payment of Tax

Sec. 1. Each title insurance company receiving premiums from the business of title insurance shall pay to the comptroller a tax on those premiums as provided in this article.

Premium Defined

Sec. 2. In this article premium means the total amount of premiums received for the taxable year on title insurance written on property located in this state except premiums received from other licensed title insurance companies for reinsurance, less return premiums paid policyholders with no deduction for premiums paid for reinsurance.

Time of Filing and Payment

Sec. 3. (a) A premium tax return for each taxable year ending on December 31 of the preceding year shall be filed and the total amount of the tax due under this article shall be paid on or before March 1 of each year or another date prescribed by the comptroller.

(b) A semiannual prepayment of premium tax must be made on March 1 and August 1 by all insurers with net tax liability for the previous calendar year of more than $1,000. The tax paid on each date must equal one-half of the total premium tax paid for the previous calendar year. If no premium tax has been paid during the previous calendar year, the semiannual payment shall equal

the tax that would be owed on the aggregate of the gross premium receipts for the two previous calendar quarters at the minimum tax rate specified by law. The comptroller may refund any overpayment of premium taxes that results from the semiannual prepayment system established by this subsection.

(c) Without limiting the general authority of the comptroller to adopt rules to promote the efficient administration, collection, enforcement, and reporting of taxes under this code or another insurance law of this state, the commissioner or comptroller, as appropriate, may adopt rules, regulations, minimum standards, and limitations that are fair and reasonable as may be appropriate for the augmentation and implementation of this article.

Rate of Tax

Sec. 4. There is imposed on all premium on title insurance an annual tax equal to 1.35 percent.

Sec. 4A. Expired.

Annual Tax Return

Sec. 5. Each title insurance company that is liable under this article to remit tax on premium shall file a tax return annually on forms prescribed by the comptroller.

Sec. 6. Repealed by Acts 1993, 73rd Leg., ch. 685, § 3.29(5), eff. Sept. 1, 1993.

Examination and Evaluation Fee Credits

Sec. 7. The amount of all examination and evaluation fees paid in each taxable year to the State of Texas by a title insurance company shall be allowed as a credit on the amount of premium taxes due under this article. The limitations provided by Sections 803.007(1) and (2)(B) of this code for domestic insurance companies apply to foreign insurance companies. Any credit allowed by this section is in addition to any other credits allowed by law.

No Other Taxes to be Levied or Collected; Exceptions

Sec. 8. (a) Title insurance companies and title insurance agents subject to the tax levied by this article may not be required to pay any additional tax in proportion to their gross premium receipts levied by this state or any county or municipality except as otherwise provided by this code and the Labor Code. This exemption may not be construed to limit the applicability of other taxes, fees, and assessments that are imposed by other chapters of this code. This exemption may not be construed to prohibit the levy and collection of state, county, and municipal taxes on the real and personal property of title insurance companies and title insurance agents, or the levy and collection of state, county, and municipal taxes that are imposed by other laws of this state, unless a specific exemption for title insurance companies and title insurance agents is provided in those laws.

(b) The premium tax is levied on all amounts defined to be premium in this Chapter, whether paid to the title insurance company or retained by the title insurance agent, such tax being in lieu of the tax on the premium retained by the agent. The State of Texas facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State.

Failure to Pay Taxes

Sec. 9. A title insurance company failing to pay all taxes imposed by this article is also subject to Article 4.05 of this code.

Sec. 10. Repealed by Acts 1993, 73rd Leg., ch. 685, § 3.29(5), eff. Sept. 1, 1993.

Secs. 11, 12. Repealed by Acts 1989, 71st Leg., ch. 232, § 25(b)(5) and (b)(6), eff. Sept. 1, 1989.

Secs. 13, 14. Repealed by Acts 1999, 76th Leg., ch. 852, § 5(2), eff. June 18, 1999.

Other Laws to Govern

Sec. 15. Article 4.12 applies to title insurance companies which are subject to this article.

Sec. 16. Repealed by Acts 2003, 78th Leg., ch. 209, § 59(3).

* * * * *

2. Article 21.46 of the former Texas Insurance Code (2004) (current version at Tex. Ins. Code §§ 281.001-.008) provided as follows:

Retaliatory Provisions; Payment of Taxes, Fines, Penalties, Etc.; Condition Precedent to Doing Business in State; Exemptions

Retaliatory Tax

Sec. 1. (a) Whenever by the laws of any other state or territory of the United States any taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon a similar insurance company of such other state or territory doing business in this State, the comptroller shall impose upon and collect from any similar company of such state or territory in the same manner and for the same purpose, the same taxes, licenses, fees, fines, penalties, deposit re-

quirements or other obligations, prohibitions or restrictions; provided, however, the aggregate of taxes, licenses, fees, fines, penalties or other obligations imposed by this State pursuant to this Article on an insurance company of another state or territory shall not exceed the aggregate of such charges imposed by such other state or territory on a similar insurance company of this State that may be licensed and doing business.

(b) Whenever under the law of any state or territory the rate of taxation is reduced or a tax credit is granted to any such company making investments in the state or territory, having maintained offices in the state or territory, or meeting some other similar requirements of the state or territory, those laws shall be applied in the same manner in this state in the determination of the aggregate obligations under this Article.

(b-1) Expired.

(c) For the purpose of this Section, an alien insurer shall be deemed a company of the State designated by it wherein it:

(1) has established its principal office or agency in the United States;

(2) maintains the largest amount of its assets held in trust or on deposit for the security of its policyholders or policyholders and creditors in the United States; or

(3) was admitted to do business in the United States.

(d) The tax collected by the comptroller under this Article shall be deposited in the State Treasury to the credit of the general revenue fund. The comptroller shall prescribe the due date for the filing of the report and payment of the tax under this Article. The comptroller may adopt rules concerning the administration and collection of taxes under this Article.

(e) The provisions of this Section shall not apply to ad valorem taxes on real or personal property, personal income taxes, sales taxes, or to surcharges that insurers may recoup directly from policyholders.

(f) The provisions of this Act shall not apply to a company of any other state doing business in this State if fifteen per cent (15%) or more of the voting stock of said company is owned by a corporation organized under the laws of this State, and domiciled in this State; however, the prior provisions of this Act shall apply without exception to any and all person or persons, company or companies, firm or firms, association or associations, group or groups, corporation or corporations, or any insurance organization or organizations of any kind, which did not qualify as a matter of fact, under the exception of this paragraph, on or before January 29, 1957.

(g) The provisions of this Section shall not apply to special purpose assessments, such as guaranty association assessments, high risk health pool assessments, joint underwriting association (JUA) assessments, windstorm association assessments, or other similar assessments, both under the laws of this State and under the laws of any other state or territory. Any tax offset or credit related to such assessments that is offset or credited in computing aggregate taxes under this Section for this State and any other state or territory, shall, for purposes of this Section, be treated as a tax paid both under the laws of this State and under the laws of any other state or territory.

Other Retaliatory Provisions

Sec. 2. Should the insurance department, commissioner, director, or other similar insurance regulatory official of any other state or territory of the United States impose any sanctions, fines, penalties, financial or deposit requirements, prohibitions, restrictions, regulatory re-

quirements, or other obligations of any kind upon any insurance company organized or chartered in this state and licensed to transact business in such other state or territory, because of the failure of the Texas Department of Insurance to obtain, maintain, or receive accreditation certification or any similar form of approval, compliance, or acceptance from, by, or as a member of the National Association of Insurance Commissioners, or any committee, task force, working group, or advisory committee thereof, or because of the failure of the Texas Department of Insurance to comply with any directive, financial annual statement requirement, model act or regulation, market conduct or financial examination report or requirement, or any report of any kind of the National Association of Insurance Commissioners, or any committee, task force, working group, or advisory committee thereof, the Texas Department of Insurance shall, without exception or exclusion, impose upon any and all insurance companies organized or chartered in such other state or territory and licensed to do business in this state the same sanctions, fines, penalties, deposit requirements, prohibitions, restrictions, or other obligations imposed upon the insurance company of this state.

APPENDIX I

STATE RETALIATORY TAX STATUTES

Ala. Code § 27-3-29
Alaska Stat. § 21.09.270
Ariz. Rev. Stat. § 20-230
Ark. Code § 23-63-102
Cal. Ins. Code § 685(a)
Colo. Rev. Stat. § 10-3-209(2)
Conn. Gen. Stat. § 12-211
18 Del. Code § 532
D.C. Code § 31-205(f)
Fla. Stat. § 624.5091
Ga. Code § 33-3-26
Idaho Code § 41-340
215 Ill. Comp. Stat. 5/444
Ind. Code § 27-1-20-12
Iowa Code § 505.14
Kan. Stat. § 40-253
Ky. Rev. Stat. § 304.3-270
La. Rev. Stat. § 22:1079
24-A Me. Rev. Stat. § 428
Md. Code Ins. § 6-303
Mass. Gen. Laws ch. 63 §§ 21, 23
Mich. Comp. Laws § 500.476a
Minn. Stat. § 297I.05(11)
Miss. Code § 27-15-123
Mo. Stat. § 375.916
Mont. Code § 33-2-709
Neb. Rev. Stat. § 44-150
Nev. Rev. Stat. § 680A.330
N.H. Rev. Stat. § 400-A:35

N.J. Stat. § 17B:23-5
N.M. Stat. § 59A-5-33
N.Y. Ins. Law § 1112
N.C. Gen. Stat. § 58-16-25
N.D. Cent. Code § 26.1-11-06
Ohio Rev. Code § 5729.06
36 Okla. Stat. § 628
Or. Rev. Stat. § 731.854
40 Pa. Stat. § 50
R.I. Gen. Laws § 27-2-17
S.C. Code § 38-7-90
S.D. Codified Laws § 58-6-70
Tenn. Code § 56-4-218
Tex. Ins. Code § 281.004
Utah Code § 31A-3-401
8 Vt. Stat. § 3367
Va. Code § 38.2-1026
Wash. Rev. Code § 48.14.040
W. Va. Code § 33-3-16
Wis. Stat. § 76.66
Wyo. Stat. § 26-3-130

Hawaii has no retaliatory tax statute.

APPENDIX J

STATE PREMIUM TAX STATUTES

Ala. Code § 27-4A-3(a)(3)
Alaska Stat. § 21.66.110(a)
Ariz. Rev. Stat. §§ 20-224(D), 1566(A) (income tax)
Ark. Code § 26-57-603(d)
Cal. Rev. & Tax. Code §§ 12201, 12231
Colo. Rev. Stat. § 10-3-209
Conn. Gen. Stat. §§ 12-202, -210
18 Del. Code § 702(c)(1)
D.C. Code § 31-205(b)
Fla. Stat. § 624.509(1)
Ga. Code § 33-8-4(a)
Haw. Rev. Stat. § 431:7-202(d)
Idaho Code § 41-402(1)(b), (2)(a)
215 Ill. Comp. Stat. 5/409
Ind. Code § 27-1-18-2(a)
Kan. Stat. § 40-252
Ky. Rev. Stat. § 136.340(1)
La. Rev. Stat. § 47:224(A)
36 Me. Rev. Stat. § 2513
Md. Code Ins. § 6-102(b)(5)
Mass. Gen. Laws ch. 63 § 22
Mich. Comp. Laws § 208.1235
Minn. Stat. § 297I.05(1)
Miss. Code §§ 27-15-103(1), -109(1)
Mo. Stat. § 148.320
Mont. Code § 33-2-705(2)
Neb. Rev. Stat. § 77-908
Nev. Rev. Stat. § 680B.027(1)
N.H. Rev. Stat. § 400-A:32(I)

N.J. Stat. 54:18A-1
N.M. Stat. § 59A-6-2(B)
N.Y. Tax Law § 1502-a
N.C. Gen. Stat. § 105-228.5
N.D. Cent. Code § 26.1-03-17(1)
Ohio Rev. Code § 5729.03
36 Okla. Stat. § 624(A)(2)
Or. Rev. Stat. § 317.655
72 Pa. Stat. § 7902(a)
R.I. Gen. Laws § 44-17-1
S.C. Code § 38-7-20
S.D. Codified Laws § 10-44-2
Tenn. Code § 56-35-107
Tex. Ins. Code § 223.003
Utah Code § 59-9-101(3)
32 Vt. Stat. § 8551
Va. Code § 58.1-2501(1)
Wash. Rev. Code § 48.29.150 (income tax)
W. Va. Code § 33-3-14(a)
Wis. Stat. § 76.63(1)
Wyo. Stat. § 26-4-103(2)

Iowa Code § 515.48(10) prohibits title insurance.

(3)

Supreme Court, U.S.
FILED
MAR 30 2009
OFFICE OF THE CLERK

No. 08-721

In the Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS FOR THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Like virtually every other State, Texas has a retaliatory-tax statute that is designed to equalize the tax burdens borne by its domestic and foreign-based insurance companies. If a foreign insurer's home state would impose a greater aggregate tax burden on a Texas insurer than Texas "directly imposes" on the foreign insurer, Texas applies a retaliatory tax to the foreign insurer in the amount of the difference.

The calculation of retaliatory taxes is directly affected by Texas's pass-through system for collecting premium taxes on title insurance. In Texas, title agents, which are distinct entities from title-insurance companies, are responsible for 85% of the premium taxes, which they remit to title-insurance companies. Title-insurance companies are then required to remit the entire amount of taxes due to the State. Because a title-insurance company is only burdened by 15% of the premium taxes in Texas, Texas includes only that 15% in the company's aggregate tax burden when calculating the retaliatory tax owed to the State.

When calculating the retaliatory taxes owed by foreign title-insurance companies, does the Equal Protection Clause require Texas to credit those companies with premium taxes that they have remitted on behalf of title agents?

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BRIEF IN OPPOSITION

Petitioners seek review of the Texas Supreme Court's decision that applying Texas's retaliatory-tax statute to foreign-based title insurers does not violate the Equal Protection Clause. But the case does not warrant review for several reasons. First, Petitioners have failed to identify any conflict among state or federal courts that is implicated by the Texas Supreme Court's decision. Second, contrary to Petitioners' assertions, the case does not present issues of "vital interest" to the national insurance industry, nor does it "dramatically alter the legal landscape" concerning challenges to state retaliatory-tax regimes. Pet. 15. Rather, the lower court's decision turned on interpreting Texas's unique statutes concerning the assessment of premium taxes on title insurers and their independent title agents. And because the decision focused on Texas's particular method of collecting premium taxes from one segment of the insurance industry—title insurers and title agents—it did not herald any significant change concerning nationwide retaliatory-tax regimes or challenges to those regimes.[1]

Finally, Petitioners have failed to demonstrate any disharmony between the lower court's decision and the Court's relevant Equal Protection Clause precedent concerning state taxation of foreign insurance companies. In *Western & Southern Life Insurance Co. v. State Board of Equalization*, the Court held that retaliatory taxes do not generally violate the Equal Protection Clause. 451

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1. It is therefore unsurprising that the insurance industry has offered virtually no support for the petition. Indeed, only one amicus brief has been filed in support of Petitioners, by a group of affiliated title insurers, and it makes no argument that this case will result in dire consequences to the national insurance industry.

U.S. 648, 674 (1981). The Texas retaliatory tax statute, in form and function, operates just like the California statute upheld in *Western & Southern*. The crux of Petitioners' complaint actually concerns the effect of Texas's pass-through system for collecting title-insurance-premium taxes on the calculation of foreign title insurers' retaliatory taxes. Under Texas law, title agents must remit 85% of the premium taxes to title-insurance companies, and the title-insurance companies must then remit the entire amount of taxes due to the State. Petitioners do not, and cannot, dispute that 85% of the premium taxes do not come "out of their pocket," so to speak; nonetheless, they want to be credited for those monies for retaliatory-tax purposes *as if* they had actually been burdened with the tax. But because none of the Court's Equal Protection Clause cases stand for the proposition that retaliatory taxes must be adjusted to credit foreign insurance companies for tax payments actually borne by other parties, this case presents no conflict with the Court's precedent warranting review.

STATEMENT

I. BACKGROUND

A. Premium Taxes

1. Texas, like most other States, imposes a tax on title insurance premiums. TEX. INS. CODE art. 9.59, §§ 1, 4;[2] *see*

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2. Texas recodified its premium-tax statutes in 2003. *See* TEX. INS. CODE §§ 223.001-.011. The Legislature did not intend the recodification to make any substantive changes to the law. Act of May 22, 2003, 78th Leg., R.S. ch. 1274, 2003 Tex. Gen. Laws 3611. For clarity, the brief will refer to the version of the statutes in effect at the time the facts of this case arose.

also Pet. App. 75a-76a. Texas also regulates the division of premiums between title agents and insurance companies: agents keep 85% of the premiums and remit 15% to the insurance company. 28 TEX. ADMIN. CODE § 9.1 (adopting Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, which sets the division between insurance companies and agents). Texas's premium tax, however, is imposed on 100% of the premiums, regardless of whether they are retained by the agent or remitted to the insurer. TEX. INS. CODE art. 9.59, § 8(b).

Instead of burdening one party with the entire premium tax or creating two separate collection mechanisms (one for insurers and one for agents), the Texas Legislature chose to consolidate the collection process by making title insurers pass-through entities for title agents' premium taxes. *See id.* §§ 1, 8(b). As described by the Texas Supreme Court, "'[I]n lieu of creating a separate tax collection system for insurance agents, the Legislature implemented an integrated system of taxation with the insurance company acting as the central collection point." Pet. App. 11a. Title agents remit their portion of the premium tax (85%) to title-insurance companies who, in turn, remit the entire premium tax to the State.

Texas has further simplified this process by building the title agents' tax burden into the mandated division of premium. TEX. INS. CODE art. 9.59, § 8(b). Specifically, Texas "set[s] the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State." *Id.* Texas's premium division of 85/15 was set

by the Department of Insurance with the understanding that the insurer's portion would include the agent's tax burden. Once the insurer receives its portion of the premium from the agent, the insurer is legally obligated to pay the entire tax to the State. *Id.* § 1. But, if the title insurer does not receive the required premium from the title agent, it is not obligated to pay the full premium tax, as insurers and agents are separately liable for their portions of the tax. 34 TEX. ADMIN. CODE § 3.831(4)(C).

In sum, although Texas law places a duty on the title insurer to remit the entire premium tax to the State, that duty arises only when the insurer receives its share of the premium from the title agent. The only burden placed on insurance companies with respect to the agent's portion of the tax is an "administrative burden of acting as a conduit for the agents' tax payments." Pet. App. 12a.

The Texas Legislature has recognized that both insurance companies and agents pay premium taxes by exempting both from paying other taxes. Article 9.59, § 8(a) provides that "[t]itle insurance companies and title insurance agents *subject to the tax levied by this article* may not be required to pay any additional tax in proportion to their gross premium receipts levied by this state or any county or municipality . . . ." (emphasis added).[3] Thus, Texas's premium-tax system makes both title-insurance companies and title agents responsible for their proportionate burden of the premium tax and exempts them from other taxes as a result.

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3. The Texas Tax Code also exempts title insurance companies and title agents from paying Texas's franchise tax. TEX. TAX CODE § 171.052.

2. Texas's premium tax system has not always existed in its current form. Prior to 1988, Texas taxed title-insurance premiums in accordance with a general tax scheme that applied to multiple types of insurance and simply imposed an annual tax on "insurance carriers." TEX. INS. CODE art. 4.10, § 1, Act approved May 16, 1907, 30th Leg., 1st C.S., ch. 18, § 8, 1907 Tex. Gen. Laws 479, 482-84 (amended 1981), repealed by Act of May 22, 2003, 78th Leg., R.S., § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138. In 1987, the Texas Legislature enacted article 9.59, separating the taxation of title insurance from that of other insurance. Act of June 1, 1987, 70th Leg., R.S., § 22, 1987 Tex. Gen. Laws 3610, 3638-40. This article created the same pass-through system described above—facilitating the collection of premium taxes by including the agent's taxes within the division of premium and exempting insurers and agents from other taxes. *Id.*

In 1996, the Texas Comptroller of Public Accounts issued a letter interpreting article 9.59 in response to questions from the State of Oregon. 2.R.585-86.[4] The Comptroller took the position that both title-insurance companies and title agents are taxpayers under Texas's premium-tax system and, therefore, title insurers would be allowed to adjust their tax filings if title agents failed to remit the required portion of premiums. 2.R.585. The Comptroller reserved the right to take enforcement action against delinquent title agents to collect the premium taxes due. *Id.* Thus, the Comptroller concluded that a title insurer's premium-tax liability is based only on its

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4 Citations to the record are in the form [volume number].R.[page number].

portion of the premiums. 2.R.586. Four years later, in 2000, the Comptroller made her position publicly available by including it in a letter published on the Comptroller's online State Tax Automated Research System (STAR system).[5] 2.R.588-90.

In 2001, the Comptroller reinforced her view that title agents are taxpayers of the premium tax by amending the relevant administrative rule to state that insurers and agents are "separately liable for the [premium] tax." 34 TEX. ADMIN. CODE § 3.831(4)(C); *see also Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976) (stating that properly enacted administrative rules have the force and effect of law in Texas). Therefore, title insurers are not guarantors of the entire premium tax. Rather, they are responsible for 15% of the tax and bear only an administrative burden of remitting the agent's 85% of the tax to the State once it is received from the agent.

B. Retaliatory Taxes

1. In *Western & Southern*, the Court considered the constitutionality of California's retaliatory-tax statute and determined that it did not violate the Equal Protection Clause because it was rationally related to the legitimate state interest of "promot[ing] . . . domestic industry by deterring barriers to interstate business." 451 U.S. at 671; *see also* U.S. CONST. amend. XIV, § 1. As described by the Court, retaliatory taxes under California's statute were

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5 The STAR system is located at http://cpastar2.cpa.state.tx.us/index.html (last visited Mar. 27, 2009), and the letter referenced is No. 200009751L.

computed by comparing the taxes owed by a foreign insurance company in California with the total taxes that would be imposed on a hypothetical California insurance company doing business in the foreign company's state of origin. *Western & Southern*, 451 U.S. at 650-51. If the taxes on the hypothetical California company were higher than those of the foreign company in California, California imposed a retaliatory tax in the amount of the difference between the two. *Id.* at 651. Use of the retaliatory tax thus "appl[ied] pressure on other States to maintain low taxes on California insurers." *Id.* at 669-70.

2. Texas's retaliatory-tax statute is similar in form and effect to California's retaliatory-tax statute. *Compare* CAL. INS. CODE § 685(a) *with* TEX. INS. CODE art. 21.46, § 1(a).[6] Texas's retaliatory law, like that of all other States, does not demand a line-by-line comparison of tax rates and fees, but rather requires a comparison of aggregate tax burdens. TEX. INS. CODE art. 21.46, § 1(a); *see also* Pet. App. 73a-74a. Specifically, Texas compares the "aggregate . . . taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions" directly imposed on a foreign insurance company in Texas with those imposed on a hypothetical Texas insurance company doing business in the foreign insurer's state. TEX. INS. CODE art. 21.46, § 1(a). For example, if a California title-insurance

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6. Texas has also recodified its retaliatory-tax statute without substantive change. *See* TEX. INS. CODE § 281.004; Act of May 22, 2003, 78th Leg., R.S., ch. 1274, 2003 Tex. Gen. Laws 3611. The brief will refer to the version of the statute in effect at the time the facts in this case arose.

company's tax burden in Texas is $800, but an identical Texas company operating in California would face a tax burden of $1000, the amount of retaliatory tax in Texas is $200.

Comparing the aggregate dollar amount owed by a title insurer is critical, because each State has its own unique tax system. Consider the tax burdens in the three states involved here: California, Minnesota, and Texas. The tax rate on title-insurance premiums in California is 2.35%, CAL. REV. & TAX. CODE § 12202; however, California's premium tax does not apply to the premiums retained by the title agent, but only to the net premiums remitted to the insurer. *See* California Title Insurance Tax Return Form Instructions, *available at* http://www.insurance.ca.gov/0250-insurers/0300-insurers/0100-applications/tax-forms-instruct-and-info/2008/index.cfm (last visited Mar. 27, 2009) (instructing insurers to deduct sum retained by underwritten title companies). Minnesota, by contrast, requires title-insurance companies to pay a 2% tax on 100% of the premiums. MINN. STAT. § 297I.05(1); *Stewart Title Guar. Co. v. Comm'r of Revenue*, 757 N.W.2d 874, 877 (Minn. 2008). Texas, as described above, makes title-insurance companies responsible for 15% of the 1.35% tax on the total premiums. *See supra*, at 2-4.

Although California has the highest tax rate of the three states, Minnesota imposes the greatest burden on insurance companies. For example, using a $1000 premium and an 85/15 split between agent and insurer, the insurance company's tax burden would be $3.53 in

California, $20.00 in Minnesota, and $2.03 in Texas.[7] Texas's retaliatory tax statute, like that of other States, focuses on the dollar amount owed by each title-insurance company, rather than a comparison of tax rates, thereby taking into account the tax structure of each State. Therefore, a Minnesota company operating in Texas—or California—would owe retaliatory taxes.

3. The calculation of retaliatory taxes in Texas was altered by the Comptroller's conclusion that title agents are responsible for 85% of the premium tax. Prior to 2000, Texas did not prohibit title insurers from including 100% of the premium tax as part of their premium-tax burden in Texas when calculating retaliatory taxes. Pet. App. 38a-39a. But, after concluding that agents are liable as taxpayers for 85% of the premium tax, the Comptroller amended the retaliatory-tax forms to provide that insurers should include only their 15% premium-tax burden in calculating whether retaliatory taxes were owed. *Id.* at 5a. In the case of Petitioners, this change increased the amount of retaliatory taxes they were required to pay. *Id.* at 6a.

II. PROCEDURAL HISTORY

A. Lower State Court Proceedings

In 2002, as a result of audits, the Comptroller determined that Petitioners owed additional taxes because they had incorrectly included taxes borne by title agents in the calculation of their retaliatory taxes. Petitioners

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7. The calculations are as follows: California = (($1000 x 0.15) x 0.0235), Minnesota = ($1000 x 0.02), and Texas = (($1000 x 0.0135) x 0.15). Other taxes and fees are set aside for purposes of this example.

paid the disputed taxes under protest and then filed separate suits for refunds, arguing that (1) the Comptroller misinterpreted Texas law, and (2) the Comptroller's interpretation violated the equal protection clauses of both the United States and Texas constitutions. The trial court granted summary judgment for the Comptroller in each suit, *id.* at 61a-64a, and the cases were consolidated on appeal. The Austin Court of Appeals affirmed, rejecting Petitioners' interpretation of state law and concluding that the application of the retaliatory tax was constitutional. *Id.* at 36a-60a.

B. Texas Supreme Court

Petitioners sought discretionary review from the Supreme Court of Texas. The court affirmed the judgment in favor of the Comptroller, concluding that the Comptroller's interpretation of the premium-tax system in article 9.59 was "reasonable and in harmony with the statute's plain meaning." *Id.* at 10a.

The court began by reviewing article 9.59 as a whole and noting that it taxed title agents on their portion of the premiums. *Id.* at 8a-12a. Focusing on the requirement that the premium be divided in such a way that the insurer receives the agent's portion of the premium tax, the court reasoned that there would be no need to ensure that the insurer receives the agent's portion of the tax if the agent was not taxed in the first place. *Id.* at 10a-11a. The court concluded that, with respect to a title agent's portion of the premium tax, the Texas Legislature intended a title-insurance company to be a "pass-through entity" and "a conduit for the agents' tax payments." *Id.* at 12a. The court compared this arrangement to federal personal income taxes that are imposed on individual

employees, even though the employer remits the bulk of the taxes. *Id.* at 11a n.40. In response to Petitioners' argument that title-insurance companies alone bore the responsibility for any tax deficiency, the court recognized that the Comptroller had alleviated that concern by promulgating a rule that made agents and insurers separately liable for their own taxes. *Id.* at 12a-13a.

The court concluded that, because title agents bore 85% of the premium-tax burden, only 15% of premium taxes were "directly imposed" on the title-insurance company for purposes of calculating the retaliatory tax. *Id.* at 12a ("At most, the only compulsion or obligation required of the insurer with regard to 85% of the premium tax is to write a check drawn on the money remitted by the agent—at the end of the day, the insurer's bank account is not negatively burdened."). That is, the court approved the Comptroller's interpretation under state law.

The court then turned to Petitioners' constitutional arguments and posed the two questions required under the rational-basis review set forth in *Western & Southern*: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Id.* at 20a (internal quotation marks omitted).

As to the first question, the court held that the statute's purpose was the same as that in *Western & Southern*—to deter barriers to interstate commerce. *Id.* at 21a. In so holding, the court confined itself to considering the legitimacy of the statute's purpose and refused to second-guess the wisdom of the Texas Legislature. *Id.* at 22a. The court rejected Petitioners' argument that the

increase in retaliatory taxes necessarily demonstrated an impermissible purpose of revenue-raising, concluding that the tax still exerted some downward pressure on foreign taxes. *Id.* at 21a-22a.

Likewise, the court also held that the second prong of the equal-protection analysis was met. The court "ha[d] no trouble" concluding that the Comptroller could rationally have believed that lowering tax burdens in Texas would encourage other States to lower their burdens as well. *Id.* The court countered the dissent's argument that Texas was comparing 15% of its taxes to 100% of other States' taxes by noting that the proper comparison is between tax burdens on individual companies, not tax rates on industries. *Id.* at 22a-23a.

The dissenting justices did not dispute the majority's conclusion that Texas law created a pass-through system, stating several times that insurance companies and agents "together" pay the premium tax and that 15% of the tax is the "insurer's share." *Id.* at 27a-28a. Instead, the dissenters argued that the retaliatory tax comparison should be at an industry level, without regard to whether the tax is paid by an insurer or an agent. *Id.* at 33a-34a.

REASONS TO DENY THE PETITION

Petitioners do not challenge the constitutionality of Texas's retaliatory-tax statute itself, but rather Texas's interpretation of it in light of the unique premium-tax structure enacted by the Texas Legislature. The Court should decline to hear their petition for several reasons. First, there is no split or confusion among lower courts regarding the Court's retaliatory-tax jurisprudence. Second, there is no pressing need to hear this case: no tax

war is imminent and the case affects Texas alone. And third, the Texas Supreme Court correctly followed the Court's precedent in ruling that the Comptroller's interpretation of the retaliatory-tax statute did not violate the Equal Protection Clause.

I. THERE IS NO SPLIT AMONG LOWER COURTS ON THIS ISSUE.

Although asserting that retaliatory taxes are the subject of much litigation, Petitioners fail to identify any division among lower courts on this issue—and for good reason. The cases cited by Petitioners are uniform in their understanding and application of the Court's equal-protection precedent as applied to retaliatory taxation, and none concerns the issue presented in this case—payment of a premium tax by someone other than the title-insurance company.

1. Petitioners focus on two cases in suggesting that this case implicates a conflict among the lower courts: *American Fire & Casualty Co. v. New Jersey Division of Taxation*, 912 A.2d 126 (N.J. 2006), and *United Services Automobile Association v. Curiale*, 668 N.E.2d 384 (N.Y. 1996). Pet. 16-19. But neither case addresses the constitutional issue raised by this case, much less reaches a decision conflicting with the reasoning or judgment of the Texas Supreme Court.

American Fire concerned the effect of New Jersey's premium-tax cap on the calculation of retaliatory taxes. 912 A.2d at 128. New Jersey law provided that, if an insurance company's receipt of New Jersey premiums was at least 12.5% of the company's worldwide total, New Jersey would tax only 12.5% of the company's total

premiums, regardless of whether the company received more than 12.5% of its total premiums in New Jersey. *Id.* at 129. Because the cap was not available to New Jersey insurers operating in other States, applying New Jersey's retaliatory tax to foreign insurers could erase the cap's benefits.[8] *Id.* at 132-33. The question was whether to apply the retaliatory tax to the capped or uncapped amount of premium taxes.

The New Jersey Supreme Court decided the case on state-law grounds and described its goal as reconciling the tax-cap and retaliatory-tax statutes so as to give effect to both. *Id.* at 136. The court ultimately concluded that the cap's benefits should not be taken into account in the retaliatory-tax calculation, thereby promoting business in New Jersey while still exerting some downward pressure on other States' premium taxes. *Id.* at 138. The court did not reach the insurer's claim that using the capped amount would violate the Equal Protection Clause, but simply mentioned in dicta that doing so would raise "significant constitutional questions." *Id.*

American Fire is not contrary to the Texas Supreme Court's decision: it involved a completely different statute, did not consider the effect of premium taxes imposed on someone other than the insurer, and failed to decide any constitutional question. The New Jersey court's rationale

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8. For example, if a foreign insurer received 30% of its total premiums from New Jersey insureds, New Jersey would only tax 12.5% of the company's premiums. But, unless the foreign company's home State had a similarly applicable tax cap, the hypothetical New Jersey company would be taxed on all 30% of its premiums, which would likely create a higher tax burden, resulting in a retaliatory tax on the foreign company.

also comports with that of the Texas court. Petitioners refer to the statement in *American Fire* that using the capped amount could result in retaliatory taxes from States "'with a lower tax rate than New Jersey's [stated rate]'" and claim it is contrary to the Texas Supreme Court's decision. Pet. 19 (quoting *Am. Fire*, 912 A.2d at 137). But that statement was part of the court's state-law analysis that attempted to balance the goals of the tax-cap and retaliatory-tax statutes. Further, regardless of how New Jersey may describe its statute, Texas's retaliatory-tax statute explicitly applies to aggregate tax burdens on title-insurance companies—not tax rates. *See* TEX. INS. CODE art. 21.46, § 1(a).

Curiale, the other case examined by Petitioners, also does not conflict with the lower court's decision here. In *Curiale*, the Court of Appeals of New York held that prohibiting foreign-based insurers from including a particular surcharge in the retaliatory-tax calculation violated those insurance companies' equal-protection rights. 668 N.E.2d at 315. There was no question that the insurers paid the surcharge, and the only rationale for excluding it was to "protect" various state funds. *Id.* at 314. Applying the *Western & Southern* analysis, the court recognized that protecting the State's treasury was not a legitimate purpose that justified discriminating against foreign insurance companies. *Id.* at 313-15.

The principle identified by *Curiale*, that retaliatory taxes may tax only to the point of equalization between the States, *id.* at 313, is fully realized in the Texas Supreme Court's ruling. Although it is true that, when retaliatory taxes are due, foreign title-insurance companies will remit to Texas an amount larger than the

premium-tax burden in their own State, the amount remitted includes not only the title insurer's taxes, but also the title agent's taxes that the title insurer is simply passing on to the State. When the title agent's burden is removed, the title insurer's tax burden is the same in Texas and its home State, consistent with the court's opinion in *Curiale*.[9] There is no conflict in either the results or reasoning between the Texas Supreme Court's decision and the cases cited by Petitioners.

2. Unable to demonstrate a genuine split among the lower courts, Petitioners suggest that the Court should nonetheless review this case because "other [state courts] similarly have rejected challenges to retaliatory taxes under the Equal Protection Clause or analogous state provisions—even though some of the applications of the taxes were constitutionally dubious." Pet. 19. But even assuming that the cases cited by Petitioners did indeed involve "constitutionally dubious" taxes, Petitioners fail to identify any link between the issues in this case concerning Texas's pass-through system for collecting premium taxes on title insurance and the entirely different taxes and state tax regimes at issue in those cases—other than the fact that Petitioners consider them all "constitutionally dubious."

Petitioners initially refer to three other state-court decisions: *Sun Life Assurance Co. of Canada v. Manna*,

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9. Using Petitioners' example of Minnesota's 2% tax rate, Pet. 8, a Minnesota title insurer would be required to remit to Texas 3.147% of the title-insurance premium in taxes. However, 1.147% of that amount is the title agent's 85% tax burden of Texas's 1.35% premium tax. When the agent's burden is removed, the title insurer is left paying a 2% tax in Texas—exactly what it would pay in Minnesota.

879 N.E.2d 320 (Ill. 2007), *Premera Blue Cross v. State*, 171 P.3d 1110 (Alaska 2007), and *TIG Insurance Co. v. Department of Treasury*, 629 N.W.2d 402 (Mich.), *cert. denied*, 534 U.S. 1056 (2001). Pet. 19. Of those decisions, only *TIG Insurance* addressed the federal equal protection clause as applied to retaliatory taxes and, even then, in a context different from this case. In *TIG Insurance*, the court considered a Michigan law that precluded insurers from including payments to certain associations in their tax burdens. 629 N.W.2d at 407. Those associations provided insurance for high-risk or otherwise uninsurable individuals, arguably benefitting insurers in Michigan. *Id.* at 408. The Michigan Supreme Court applied the two-prong test from *Western & Southern* and concluded that the law excluding the payments had a legitimate purpose—encouraging States to create similar associations, which could benefit Michigan insurers in those States—and that the law was reasonably related to that purpose. *Id.* at 408-09.

The other two cases were decided solely on state-law grounds. In *Sun Life*, the Illinois Supreme Court held that it was permissible under Illinois law to treat a Canadian insurance company as if it were from Michigan—its port of entry—for purposes of imposing a retaliatory tax. 879 N.E.2d at 325-28. And in *Premera*, the Alaska Supreme Court held that it was permissible to impose a lower premium tax on non-profit corporations, even if the lower rate lead to higher retaliatory taxes. 171 P.3d at 1121-24 (using Alaska's equal protection law, which is "more exacting" than its federal counterpart).

None of these cases concerns the constitutional issue presented in the petition—whether to include taxes paid

by a title agent in the title insurer's calculation of retaliatory taxes—and none is contrary to the Texas Supreme Court's decision. Moreover, there is no reason to believe that a decision by the Court in this case would provide any guidance regarding the validity of unrelated state tax schemes such as those at issue in *TIG*, *Sun Life*, and *Premera*.

3. Petitioners further assert that, because "[o]ther cases abound" concerning "the scope and nature of the equal protection constraints on retaliatory taxes," the Court should review this case because it also concerns retaliatory taxes, a "hotly disputed" issue that is "of substantial importance to the industry." Pet. 20. But the fact that retaliatory taxes generate litigation generally does not mean that this case warrants the Court's review. And the other "hotly disputed" cases cited by Petitioners concern either applying underlying tax regimes different from that at issue in this case or generic challenges to retaliatory-tax statutes that do not survive a straightforward application of the Court's decision in *Western & Southern*. *See, e.g.*, *Prudential Ins. Co. of Am. v. Comm'r of Revenue*, 709 N.E.2d 1096, 1098, 1102-03 (Mass. 1999) (upholding state tax regime providing that tax liability for life-insurance premiums would not be aggregated with tax liability for other premiums in calculating foreign insurers' retaliatory taxes); *Gallagher v. Motors Ins. Corp.*, 605 So.2d 62, 70-71 (Fla. 1992) (rejecting general challenge to Florida's retaliatory-tax statute, which was similar in form and operation to the California retaliatory-tax statute upheld in *Western & Southern*).

Indeed, Petitioners' cases actually demonstrate that state courts have consistently applied the principles of

Western & Southern to the unique tax structures at issue in each case. For example, in *Mutual Life Insurance Co. v. Washburn*, the Illinois Supreme Court rejected an argument that retaliatory taxes should be imposed only when a foreign state's taxes were "on average" greater than Illinois's taxes. 561 N.E.2d 29, 34-35 (Ill. 1990). In doing so, the court affirmed the principle that the comparison should be on a company-by-company basis. *Id.* The court then used the rationale in *Western & Southern* to affirm its interpretation under Illinois's equal protection clause. *Id.* at 37-38.

Similarly, in *Executive Life Insurance Co. v. Commonwealth*, the Commonwealth Court of Pennsylvania upheld an application of its retaliatory-tax statute under the federal equal protection clause. 606 A.2d 1282, 1285-86 (Pa. Commw. Ct. 1992). There, when calculating an insurer's hypothetical burden in California, Pennsylvania included California's tax on annuities if the insurer sold annuities, even though Pennsylvania did not tax annuities. *Id.* at 1283. The court found this reasonable, as it would act to deter California from taxing annuities, *id.* at 1286, and noted that the retaliatory-tax statute was designed to equalize the "burdens or prohibitions" on domestic and foreign companies. *Id.* at 1284.

In sum, the state-court cases cited by Petitioners do not demonstrate any split among the lower courts concerning application of the Court's equal-protection precedent to retaliatory-tax laws. Likewise, none of these cases reflects a conflict with the decision at issue here warranting the Court's review.

II. THIS CASE DOES NOT AFFECT NATIONWIDE INTERESTS.

Petitioners also argue that the Court should grant review of this case because the Texas Supreme Court's decision threatens the stability of the retaliatory-tax system and will "herald a retaliatory tax war." Pet. 14. Significantly, this dire prediction is premised entirely on Petitioners' underlying contention that the Comptroller's interpretation of Texas's premium-tax statutes means that foreign-based title-insurance companies will now pay unconstitutionally discriminatory retaliatory taxes in Texas. Because that underlying contention is untrue, and mischaracterizes how Texas's retaliatory-tax statute applies to foreign title insurers, it provides no basis for granting review.

1. Petitioners' complaint that title-insurance companies in Texas now have to pay unconstitutionally discriminatory retaliatory taxes, Pet. 22-23, is based on their erroneous assertion that out-of-state insurers will pay retaliatory taxes even if their home States impose lower premium taxes than Texas. *Id.* at 22. However, the proper comparison for retaliatory-tax purposes is not between tax rates, but between aggregate tax burdens imposed on title insurers. *See supra*, 7-9; *see also* TEX. INS. CODE art. 21.46, § 1(a). Because the only burden Petitioners bear with respect to title agents' taxes is the administrative burden of remitting those taxes to the State, Pet. App. 12a, title agents' taxes are not part of Petitioners' aggregate tax burden and should not be taken into account when calculating retaliatory taxes.

And although it is true that foreign-based title insurers may pay increased retaliatory taxes because they will no

longer be credited with premium-tax payments borne by title agents, that does not mean that the increased retaliatory taxes are *unconstitutional*. To the contrary, because the change in calculation of retaliatory taxes merely reflects more accurately the actual financial burden imposed on foreign title insurers by Texas's premium taxes, Petitioners' characterization of the change in retaliatory tax calculation as an attempt to impose unconstitutionally discriminatory taxes on foreign insurers is simply wrong.

2. Equally without merit is Petitioners' claim that the Texas Supreme Court's decision, if left undisturbed, could result in counter-retaliation leading to a "tax war." Pet. 24-25. The Court in *Western & Southern* did not discuss the prospect of counter-retaliation in its constitutional analysis. But, put in its proper context, counter-retaliation or a "tax war" informs the second prong of the rational-basis test—whether the legislature could have reasonably believed its retaliatory tax statute would support the state interest of discouraging other States from enacting excessive taxes. *See Western & Southern*, 451 U.S. at 668.

Retaliatory taxes and decisions interpreting them have existed for many years, and yet the Comptroller is unaware of any prior "tax wars," nor have Petitioners identified any. Further, the Comptroller's interpretation of the statutes in dispute here has been in place since 2001 and there has been no effect on the nationwide retaliatory-tax system. Thus, there is no evidence that disputes over retaliatory taxes have led to tax wars in the past or that the Comptroller's challenged interpretation of Texas's tax statutes will cause a tax war.

Indeed, the only evidence of possible counter-retaliation offered by Petitioners is a revenue notice issued by the Assistant Commissioner for Tax Policy and External Relations in Minnesota. *See* Minn. Dep't of Revenue Rev. Notice No. 2006-01 (Mar. 27, 2006), *available at* 2006 WL 1125895. In that notice, the Assistant Commissioner submits that if a State requires an insurance company to pay a tax on 100% of the premiums and another tax on the agents' portion of the premiums, Minnesota will consider the tax burden to include both taxes. *Id.* But Minnesota's notice is not even on point because it does not describe Texas's premium-tax system, in which a title insurer acts only as a pass-through entity for the title agent's taxes. Further, revenue notices in Minnesota "do not have the force and effect of law and have no precedential effect . . . ." MINN. STAT. § 270C.07, subd. 1. Moreover, to the extent the notice was intended to implicate Texas, it was written without the benefit of the Texas Supreme Court's subsequent authoritative interpretation of Texas's law. Thus, the notice provides no credible indication of any impending "tax war."

Finally, even if Minnesota's opinion letter is presumed to be a sign of things to come, the Texas Legislature has provided a means for the Comptroller to negotiate with other States to resolve differences on applying retaliatory taxes, further negating Petitioners' speculation that the Court must intervene here to prevent a tax war. Section 281.008 of the Texas Insurance Code, enacted in 2007, provides that the Comptroller may, by rule, agree with another State to "set aside retaliatory provisions" if use of the retaliatory statutes is not the preferred way to avoid excessive taxation. This statute allows the Comptroller to

resolve differences with Minnesota or any other State concerning retaliatory taxes. For all of these reasons, Petitioners' claim that the Court's intervention is needed to prevent a hypothetical nationwide tax war is unfounded and provides no basis to grant review.

III. THE TEXAS SUPREME COURT CORRECTLY CONCLUDED THAT TEXAS'S RETALIATORY TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Finally, the Court should decline to hear the petition because the Texas Supreme Court correctly applied the Court's equal-protection precedent to the facts of this case.

1. The Texas Supreme Court properly subjected the Comptroller's interpretation of Texas's retaliatory tax to a rational-basis review. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Thus, as described in *Western & Southern*, the Court asks two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged legislation would promote that purpose?" 451 U.S. at 668.

Turning to the first question, the Court has recognized that retaliatory-tax statutes serve a legitimate purpose—deterring excessive and discriminatory taxation. *Id.* The Comptroller's interpretation of Texas's statutes does just that—it imposes retaliatory taxes on title-insurance companies from States that impose higher premium taxes on Texas title-insurance companies,

thereby encouraging those States to lower their taxes on Texas companies. TEX. INS. CODE art. 21.46, § 1(a).

Any argument by Petitioners that the Comptroller intended her interpretation to be a revenue-raising measure is unfounded. Indeed, examining the premium-tax revenue on title insurance in Texas and Texas's total revenue during the years at issue makes clear that increasing revenue could not have been the Comptroller's purpose.

Between 1998 and 2002, premium-tax revenue on title insurance in Texas ranged from $12,417,556 to $17,721,447.[10] During that same time period, total revenue from all sources in Texas was between $44,497,247,142 and $55,221,546,458.[11] Thus, title-insurance-premium taxes account for 0.025% to 0.037% of Texas's revenue, with retaliatory taxes constituting an even smaller percentage than that.[12] Therefore, any revenue gained from the retaliatory tax is, at most, "relatively modest"—an amount that the Court in *Western & Southern* deemed too small to call into question the legitimate purpose behind the tax. 451 U.S. at 669-70.

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10. Texas's premium-tax revenue on title insurance may be found in the Underwriters Experience Reports on the Texas Department of Insurance's website: http://www.tdi.state.tx.us/reports/report8.html (last visited on Mar. 27, 2009).

11. Information regarding Texas's historical revenues by source is available on the Comptroller's website: http://www.window.state.tx.us/taxbud/revenue_hist.html (last visited Mar. 27, 2009).

12. Also during that time, title-insurance-premium taxes amounted to only 1.6% to 2.2% of insurance-occupation taxes. *See supra*, n.11.

As for the second prong of the equal-protection analysis, it was certainly reasonable for the Comptroller to believe that her interpretation of the tax statutes will encourage lower taxation, as it operates exactly like every other retaliatory-tax statute. Petitioners can have no constitutional complaint that the statute encourages their home States to lower their taxes, as all retaliatory-tax statutes have that effect. Petitioners instead claim that Texas's premium-tax burden is too low to allow for a retaliatory tax. Pet. 28. This argument suggests that there is some numerical threshold embedded in the Equal Protection Clause—*i.e.* if a State's premium tax deviates too far below the national average, then, in Petitioners' view, it is unconstitutional to apply a retaliatory tax.

That concern was never raised by the Court in *Western & Southern*, and indeed such a limit would not make sense. The purpose of retaliatory taxes is to keep tax burdens low. *Western & Southern*, 451 U.S. at 668. Texas has lowered its premium-tax burden on title-insurance companies, thus applying pressure on other States to lower their burdens. Whether other States choose to act has no bearing on the constitutionality of Texas's actions. That they might reasonably choose to act is sufficient for equal-protection purposes. *Id.* at 671-72 ("But whether *in fact* the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if we conclude that the California Legislature *rationally could have believed* that the retaliatory tax would promote its objective.").

The Texas Supreme Court properly applied the Court's equal-protection analysis to the facts of this case and

reached the correct conclusion. There is no need for the Court to revisit the decision.

2. Petitioners' argument that the Texas Supreme Court's decision violates the Court's precedent is also without merit. Pet. 25-27. All of the cases cited by Petitioners concern laws that apply higher taxes or fees to foreign corporations simply because they are foreign. *Id.*

For example, in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), the Court struck an Alabama premium-tax statute because it applied one tax rate to domestic companies and a higher rate to foreign companies, regardless of other States' tax burdens. The Court held that Alabama's statute lacked the legitimate purpose identified in *Western & Southern* of attempting to influence other States' policies. *Id.* at 877-78. Instead, the statute simply created obstacles for foreign companies in order to promote domestic business. *Id.*

Similarly, the other cases cited by Petitioners struck down statutes that discriminated against foreign companies or individuals only because they were foreign. *See, e.g.*, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) (holding unconstitutional a tax that applied only to foreign corporations); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926) (same).

The Court has recognized that retaliatory taxes do not fall within this line of cases because they serve a different purpose. Retaliatory taxes promote interstate commerce by deterring excessive taxation. *Metro. Life*, 470 U.S. at 876-77. Taxes that discriminate against foreign companies only because they are foreign promote domestic industry by penalizing foreign companies and erecting

barriers to interstate commerce. *Id.* at 877-78. The former purpose is legitimate; the latter is not. *Id.* at 878.

Texas's retaliatory-tax statute and the Comptroller's interpretation of it come within the constitutionally permissible scope of *Western & Southern*. The statute applies only to foreign companies whose home States impose a higher tax burden on title insurers than Texas does. TEX. INS. CODE art. 21.46, § 1(a). Texas does not discriminate against foreign title insurers simply because they are foreign. *Id.*

Because the Comptroller's interpretation of Texas's premium-tax and retaliatory-tax laws is consistent with the Court's precedent, the Court should decline to hear the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 2009

FILED
APR 15 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-721

IN THE

Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREGG ABBOTT, ATTORNEY GENERAL OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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CORPORATE DISCLOSURE STATEMENT

Petitioners First American Title Insurance Company and Old Republic National Title Insurance Company state that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONERS

For decades, States have computed retaliatory tax by comparing premium taxes in the insurer's home State with premium taxes in the retaliating State. Now, Texas—alone out of all 50 States—deems title insurers to "pay" only 15% of the premium tax they remit; the rest is deemed "paid" by their agents and then excluded from the retaliatory tax calculation. It is undisputed that *no* other State deems part of the insurer's tax "paid" by another entity in that fashion. To the contrary, respondents concede that Texas's approach is "unique." Br. in Opp. 1. Nor do respondents identify any State that collects premium taxes from agents directly. Cf. Pet. 21 & n.6. The incontrovertible result is that Texas now compares 100% of premium taxes elsewhere with 15% of premium taxes in Texas.

As four justices of the Texas Supreme Court explained, that result completely divorces the retaliatory tax from its permissible purpose of equalizing and moderating taxation of the national insurance industry. To avoid retaliation, other States must now either reduce their premium taxes to less than *one-sixth* of Texas's level or else adopt Texas's novel approach of shifting the taxes to other entities and then excluding them from the retaliatory-tax calculation. Texas has no legitimate interest in pursuing either goal, and could not rationally expect to achieve either in any event. And despite respondents' efforts to downplay the case's importance, the outpouring of industry concern—nearly 90% of the Nation's title insurance industry has now weighed in—confirms that the case warrants this Court's review.

I. RESPONDENTS DISTORT THE RELEVANT ISSUES

A. Attempting to avoid review, respondents obfuscate the issues. They begin by defending the Texas Supreme Court's state-law holding that title insurers in

Texas are mere "pass-through entities for title agents' premium taxes." Br. in Opp. 3. Respondents claim that petitioners have no cause to complain because "85% of the premium taxes do not come 'out of their pocket,' so to speak." *Id.* at 2. But, while Texas is certainly entitled to adopt Rube Goldberg collection mechanisms in which taxes collected from one taxpayer are deemed paid out of someone else's "pocket" for state-law purposes, Texas cannot then retaliate against insurers from 49 other States merely because those States have not imitated Texas's idiosyncratic approach. Texas's tax is unconstitutional, not because it involves a collection mechanism, but because Texas—unlike any other State—uses that mechanism to exclude 85% of the premium tax it collects when making retaliatory-tax comparisons.

The same constitutional defect would exist *even if* Texas actually collected those taxes from agents directly. Other States impose premium taxes on *insurance companies*, not agents. See Pet. 21 & n.6. That is not surprising, because premium taxes are *insurance* taxes and insurance companies—not agents—perform the traditional insurance functions of underwriting policies and paying claims. See *id.* at 4-5. Texas, by contrast, now imposes most of those taxes on *agents*. Retaliatory taxes simply do not work when one State artificially "lowers" its tax burdens by shifting them to entities that it excludes from the comparison. Thus, although it is certainly telling that Texas did not even bother to revise its collection procedures when it decided to reconceptualize who "pays" 85% of its premium tax, the State's retaliatory tax is unconstitutional even accepting its "collection mechanism" theory as *bona fide*.[1]

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[1] For that reason, the State's new rule relieving insurers of liability when an agent fails to pass on the insurer's share of the premium (34 Tex. Admin. Code § 3.831(4)(C))—promulgated for the *precise*

B. Respondents also repeatedly urge that retaliatory taxes should compare "dollar amount[s]" rather than "tax rate[s]." See Br. in Opp. 7-9, 15, 20. But the defects in Texas's approach are readily apparent under either analysis. In respondents' view, Minnesota and California insurers should pay retaliatory tax in Texas because, with an 85/15 split on a $1,000 premium, the *insurance company's* tax burden would be $20.00 in Minnesota and $3.53 in California, but only $2.03 in Texas. See *id.* at 8-9. Of course, the reason Texas's tax burden looks so low is that $2.03 is only the *insurance company's* so-called share.

Minnesota would impose a 2% premium tax on the $1,000 premium and deem the *entire* $20.00 paid by the insurance company, not the agent. See Br. in Opp. 8-9; Minn. Stat. § 297I.05(1); *Stewart Title Guar. Co.* v. *Comm'r of Revenue*, 757 N.W.2d 874 (Minn. 2008). Texas would impose a 1.35% tax on that same premium, but would deem $2.03 paid by the insurer and the other $11.47 (*i.e.*, $1,000 × 85% × 1.35%) paid by the agent. See Br. in Opp. 8-9. Texas would then compute retaliatory tax by comparing the entire $20.00 tax in Minnesota with the insurer's $2.03 share in Texas. See *ibid.* By ignoring the $11.47 tax on the agent, Texas makes Minnesota's premium tax look *ten times* larger than its own. Minnesota would have to reduce its premium taxes *tenfold* to avoid retaliation, even though there is only a modest difference between the total amount of tax each State collects on the $1,000 premium. That makes no sense.

Retaliating against California insurers makes no sense either. California would impose a 2.35% tax on the in-

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purpose of legitimizing the Comptroller's earlier reinterpretation of the State's premium tax, see Br. in Opp. 6—is beside the point. That rule may add some fig leaf of substance to the State's theory that title insurers are mere pass-through entities, but it does not alter the State's exceptionality in imposing premium taxes on agents.

surer, but on a different basis: The tax is a percentage of the insurer's share of the premium rather than the entire premium. See Br. in Opp. 8; Cal. Rev. & Tax. Code §§ 12202, 12231; *In re Ticor Title Ins. Co.*, Nos. IT HQ 34-001820-010 *et al.*, 1994 Cal. Tax LEXIS 15 (Cal. Bd. of Equalization Jan. 5, 1994).[2] The tax on the insurer would thus be $3.53. See Br. in Opp. 8-9. Like Minnesota and other States, and unlike Texas, California does not impose any premium tax (or other insurance-related tax) on agents. See *id.* at 8. California's tax of $3.53 is far less than the total of $13.50 that Texas imposes. But by shifting $11.47 of its tax to the agent, Texas again retaliates for no rational reason.[3]

II. THE PETITION PRESENTS AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE INSURANCE INDUSTRY

A. The decision below threatens grave harm to the Nation's insurance industry, for at least three reasons. First, out-of-state title insurers across the country will

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[2] As explained in the petition (Pet. 21 n.6), some States (like Minnesota) calculate the insurer's tax as a percentage of the entire "gross" premium, see *Stewart Title Guar. Co.* v. *Comm'r of Revenue*, 757 N.W.2d 874 (Minn. 2008); *Stewart Title Guar. Co.* v. *State Tax Assessor*, 963 A.2d 169 (Me. 2009), while others (like California) calculate it as a percentage of the insurer's "net" share, see pp. 3-4, *supra*. That difference is irrelevant here: Retaliatory taxes work properly, however premium taxes are computed, so long as the entire premium tax is included in the comparison. See Pet. 21 n.6.

[3] Generally applicable business taxes and the like are normally not included in the retaliatory-tax calculation because they are not insurance-related. See *Mut. Life Ins. Co. of N.Y.* v. *Washburn*, 561 N.E.2d 29, 36-37 (Ill. 1990); *Franklin Life Ins. Co.* v. *State Bd. of Equalization*, 404 P.2d 477, 484 (Cal. 1965); *Pac. Mut. Life Ins. Co.* v. *Gerber*, 174 N.E.2d 862, 864-866 (Ill. 1961). Thus, the fact that Texas exempts agents from franchise taxes (Br. in Opp. 4 n.3) is irrelevant. In any event, the State can hardly justify its new regime based on differences in taxes on agents when its retaliatory tax does not even attempt to measure those differences.

pay millions of dollars to Texas, year after year for the indefinite future, merely because they are foreign. Second, by dramatically lowering the bar for what counts as "rational," the decision will encourage other States to adopt similar ploys, a concern for both title insurers and the broader industry alike. Finally, the decision raises the prospect of counter-retaliation by other States. See Pet. 22-25. The *amicus* brief filed by seven other title insurers—representing more than $740 million in annual premiums in Texas *alone*—underscores this case's importance: That brief's signatories express alarm at the prospect of "increased retaliatory tax liability on * * * premiums collected in Texas" and fear "retaliation from sister states." Br. of Alamo Title Ins., *et al.*, at 1.

Respondents offer no real answer to most of the petition's claims of importance. They contend in a footnote that the level of *amicus* participation proves this case is *not* important, because only one industry brief was filed. Br. in Opp. 1 n.1. What respondents neglect to mention is that the seven signatories to that brief, along with petitioners and their affiliates, represent *more than 77% of the entire national title insurance industry* measured by premiums earned. See Am. Land Title Ass'n, *2007 Title Insurance Industry Statistical Analysis: Premiums Earned*, http://www.alta.org/industry/07ALL/07_TitleIndustryStatisticalAnalysis_Fam&Co.xls. A further 11% is represented by Stewart Title Guaranty Company, see *ibid.*, a Texas-based insurer that *benefits* from the State's new approach, and which filed an *amicus* brief supporting that approach below. See Post-Submission Letter Br. of Stewart Title Guar. Co. in *First Am. Title Ins. Co.* v. *Combs*, No. 05-0541 (Tex. filed Apr. 16, 2007). That nearly 90% of the Nation's $14-billion-a-year title insurance industry has participated in this case speaks volumes about its importance. Moreover, a trade association representing 93% of the Nation's *life* insurers filed

an *amicus* brief urging rehearing below, warning of "significant harm to the nationwide retaliatory tax system" from the Texas Supreme Court's decision. Br. of Am. Council of Life Insurers at 1-2, 5, in No. 05-0541 (Tex. filed July 28, 2008) ("ACLI Amicus Br."). The case is thus important to the broader industry as well.

Respondents dispute the likelihood of counter-retaliation (which, to reiterate, is only *one* of the reasons this case is important). While conceding that the Minnesota revenue notice is "evidence of possible counter-retaliation," respondents stress the absence of other examples. Br. in Opp. 21-22. That absence, however, is not surprising: The Comptroller's approach was not definitively upheld as a matter of state law until the Texas Supreme Court recently ruled, and its constitutionality still has not been conclusively determined.

Respondents claim the Minnesota notice is "not even on point" because it does not describe Texas's tax regime the same way Texas describes it. See Br. in Opp. 22. Of course, the Minnesota notice is written the way it is because its author (like much of the industry) views Texas's description as a sham. The Minnesota notice is commonly understood to represent counter-retaliation against Texas, see, *e.g.*, ACLI Amicus Br. 9-11, and viewed in context, that is its plain intent. Although respondents suggest that Minnesota might change its mind now that the Texas Supreme Court has "authoritative[ly] interpret[ed]" Texas law, they offer no credible basis for that prediction. Br. in Opp. 22. The irrationality of the Comptroller's approach has not gone away just because a bare majority of the Texas Supreme Court endorsed it.[4]

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[4] Although not precedential, Minnesota revenue notices "may be relied on by taxpayers until revoked or modified." Minn. Stat. § 270C.07(2). In any event, the notice is the best evidence of how Minnesota will interpret its tax regime in light of Texas's position.

Finally, respondents point to a recently enacted provision of Texas law that allows the Comptroller to abate retaliatory taxes if, after "negotiat[ing]" with another State, she determines such taxes are "not the preferred way to avoid excessive taxation." Br. in Opp. 22-23 (citing Tex. Ins. Code § 281.008). While not suggesting that this newly minted negotiation authority could render an otherwise invalid tax constitutional, respondents contend that it diminishes the case's importance. See *ibid.* But the Comptroller's utterly discretionary authority—to reduce taxes on foreigners if the Comptroller "prefer[s]" not to impose them—is so unlikely to be exercised in this instance that it has no conceivable bearing on this case's importance. The Comptroller has been defending the State's approach in the courts for years; there is no realistic possibility that other States will persuade her to abandon the approach of her own accord. Besides, insurers who have already been paying Texas's discriminatory tax for almost a decade will derive no comfort from the Comptroller's as-yet-unexercised authority.

B. Respondents devote much of their brief to disputing the level of conflict among the courts, emphasizing that the other cases cited in the petition involved "different statute[s]" and "did not consider the effect of premium taxes imposed on someone other than the insurer." Br. in Opp. 13-19. That is true enough: The petition did not claim otherwise. See Pet. 19. But that does not make the cases irrelevant.

Cases such as *United Services Automobile Ass'n* v. *Curiale*, 668 N.E.2d 384 (N.Y. 1996), and *American Fire & Casualty Co.* v. *New Jersey Division of Taxation*, 912 A.2d 126 (N.J. 2006), involved *parallel* issues because each involved a State's effort to impose retaliatory tax in a way that divorced the tax from its legitimate equalizing and moderating purpose. New York did so by characterizing part of its tax as a mass-transit surcharge that it

excluded from the retaliatory-tax comparison. See Pet. 17-18. New Jersey did so by interpreting its retaliatory tax to negate any benefits under its tax-cap statute, resulting in substantial retaliatory taxes on foreign insurers even where their home States had lower premium taxes. See *id.* at 16-17. Texas has now done so by shifting most of its premium tax to agents. The statutory artifice employed in each case is different, but the constitutional defects are the same.

Petitioners have never claimed a direct conflict involving identical state taxes. But this case warrants review nonetheless. It is enormously important to the industry; disputes of this general nature are recurring; and the decision below flies in the face of this Court's precedents. See Sup. Ct. R. 10(c). Refusing to review cases like this simply because there is no direct conflict involving identical state taxes would effectively insulate such decisions from scrutiny altogether. Texas's approach is unconstitutional *precisely because* it is "unique" (Br. in Opp. 1): Texas now retaliates against essentially *all* foreign title insurers, not because of any substantive difference in tax levels, but because Texas has its own unique way of allocating premium tax. And because there are an infinite number of ways in which States can manipulate their own unique tax regimes to produce similarly broken retaliatory-tax results, direct conflicts are unlikely to arise. That does not diminish the potentially devastating consequences for the industry or the importance of ensuring that States pay more than lip service to this Court's precedents.

III. Respondents Fail To Reconcile The Decision Below With This Court's Precedents

Respondents' arguments on the merits are insubstantial. Citing *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), re-

spondents argue that Texas's retaliatory tax cannot be unconstitutional because it accounts for only a small portion of the State's budget—at most, a supposedly "modest" $12 to $17 million per year. Br. in Opp. 24. But size cannot legitimize an otherwise unconstitutional discriminatory tax. See *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 n.3 (1996); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 405-407 (1984). Respondents' implausible suggestion that the amounts at stake are so small that state officials could not possibly have cared enough to have acted for an improper purpose is belied by their own conduct. The State and the industry have vigorously litigated this issue for years, proving that those tens of millions of dollars *do* matter. Besides, petitioners have no burden to show that the tax reflects an illegitimate purpose (whether to raise revenue or to favor one or more domestic title insurers at the expense of foreign competitors)—only that it could not rationally be expected to promote a legitimate one. See *Western & Southern*, 451 U.S. at 668.

Western & Southern did mention the "relatively modest" amounts raised by California's tax, *among several other factors*, in upholding it. See 451 U.S. at 668-671. But that case obviously does not stand for the proposition that States can enact whatever discriminatory taxes they like—however unlikely the taxes may be to promote uniformity and moderation of taxation of the national insurance industry—so long as the State's "take" isn't too large. This Court upheld California's tax because it was "virtually identical to [taxes imposed] by many other States" and thus could rationally be expected to promote uniformity and moderation. *Id.* at 669-670. Texas's aberrant tax has no such effect.

Respondents caricature the petition as asserting that Texas's retaliatory tax is unconstitutional merely because its premium tax is "too low." Br. in Opp. 25. The prob-

lem is not that Texas's premium tax is "too low." The problem is that the State has artificially made the tax *appear* low by shifting 85% of it to other entities that the State then excludes from the retaliatory-tax comparison—something no other State does.

Finally, respondents dismiss this Court's precedents on the ground that they involved attempts to impose higher taxes on foreign insurers "simply because they [we]re foreign." Br. in Opp. 26-27. But that is what Texas does too. Because Texas now artificially excludes 85% of its premium tax in computing retaliatory tax, Texas's burdens will inevitably appear much lower than any other State's. Respondents do not identify a *single State* whose insurers would not pay retaliatory tax merely for doing business in Texas. Texas may have accomplished that result by more subtle means than those attempted in the past, but the result is no less pernicious.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2009

Supreme Court, U.S.
FILED
FEB 5 - 2009
OFFICE OF THE CLERK

No. 08-721

IN THE

Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF ALAMO TITLE INSURANCE, CHICAGO TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, FIDELITY NATIONAL TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SECURITY UNION TITLE INSURANCE COMPANY, AND TICOR TITLE INSURANCE COMPANY, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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February 5, 2009

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QUESTION PRESENTED

Under *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981) and *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), retaliatory taxation by the states is legitimate precisely because it aims to equalize domestic and foreign taxation. In this case, Texas' retaliatory tax statute has been interpreted to produce an effective premium tax rate of 0.2025%. Texas has gone beyond the point of equalization because no legislature could reasonably believe a sister state would reduce its premium tax to this negligible rate. Necessarily then, has the Texas statute lost its legitimacy under the Equal Protection Clause?

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INTEREST OF *AMICI CURIAE*

This amicus brief is presented by seven title insurance underwriters, which engage in a significant amount of title insurance business in Texas and across the country—Alamo Title Insurance, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Fidelity National Title Insurance Company, Lawyers Title Insurance Corporation, Security Union Title Insurance Company, and Ticor Title Insurance Company (collectively "Amici Title Insurers").[1] With the exception of Alamo Title, all of these underwriters are incorporated and domiciled in states other than Texas. Chicago Title, Commonwealth, and Lawyers Title are domiciled in Nebraska. Fidelity, Security Union, and Ticor are domiciled in California. In 2007 alone, the non-domiciled Amici Title Insurers collected in excess of $740 million in title insurance premiums in Texas. They will face increased retaliatory tax liability on their premiums collected in Texas if this Court denies the Petitioners' Petition for Writ of Certiorari and allows the Texas Comptroller's reinterpretation of the Texas retaliatory tax statute (called "new math" by the Texas Supreme Court Majority) to stand. In the case of Alamo Title, because of Texas' retaliatory tax treatment, it risks retaliation from sister states in which it does business. Amici Title Insurers submit

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court. Further, counsel of record for the parties received timely notice of the intent of Amici Title Insurers to file this brief. Amici Title Insurers state that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than Amici Title Insurers made such a monetary contribution.

that the Comptroller's "new math" renders Texas' retaliatory tax statute unconstitutional by going beyond what this Court held Constitutionally permissible under the Equal Protection Clause in *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). As such, Amici Title Insurers urge this Court to grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The Texas Comptroller increased Texas state revenues under the State's retaliatory tax system by deciding for purposes of calculating the retaliatory tax to exclude 85% of the assessed state premium tax. This Court should take the opportunity to consider the constitutional principles enunciated in *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981), in this context. In *Western & Southern*, this Court held that a California retaliatory tax law was legitimately purposed and passed muster under the Equal Protection Clause when the tax on foreign insurers could "apply pressure on other States to maintain low taxes on California insurers" and "promot[e] domestic industry by deterring barriers to interstate business" and when lawmakers could reasonably believe that the retaliatory tax could achieve those purposes. *Id.* at 669-70, 671.

With the Texas Comptroller's "new math" reinterpretation of the Texas retaliatory tax statute, this legitimate purpose disappears. Under the Texas Comptroller's "new math," eighty-five percent of the state tax on title insurance premiums is ignored for purposes of calculating the retaliatory taxes owed by

foreign insurers, making the effective tax rate on those premiums only 0.2025%. The constitutional principles enunciated in *Western & Southern* will not accept as rational that Texas lawmakers could believe other States would respond by lowering their tax rates on Texas insurers to such a negligible rate. Simply, the new interpretation of the Texas retaliatory tax statute is not rationally related to the legitimate state purpose under the Equal Protection Clause identified by this Court in *Western & Southern*, and the only purposes that the statute could reasonably be thought to have—raising revenues or penalizing foreign insurers—are not legitimate under this Court's Equal Protection jurisprudence. Accordingly, the new interpretation, as settled by the Texas Supreme Court, renders the statute unconstitutional, and this Court should grant review.

ARGUMENT

1. Under *Western & Southern*, a retaliatory tax statute passes Equal Protection muster only if it has the legitimate state purpose of promoting domestic industry by applying pressure on other States to maintain low taxes on the retaliating State's domestic insurers.

This Court considered the constitutional principles governing the right of States to impose retaliatory taxes in *Western & Southern*. There, this Court upheld California's retaliatory tax against constitutional challenge. In doing so, the Court explained a State may not impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a

rational relation to a legitimate state purpose." *Western & Southern*, 451 U.S. at 668. The Court concluded that California's tax had the legitimate purpose of promoting the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes:

> Since the amount of revenue raised by the retaliatory tax is relatively modest . . . and the impetus for passage of the tax comes from the nationwide insurance industry, it is clear that the purpose is not to generate revenue at the expense of out-of-state insurers, but to apply pressure on other States to maintain low taxes on California insurers.

Id. at 669-70.

Later, in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), this Court relied on the principles enunciated in *Western & Southern* to hold that an Alabama differential premium tax statute did not pass Equal Protection muster, at least under the two expressed statutory purposes. Essentially the state statute coerced foreign insurers to invest domestically by imposing a higher premium tax, but reducing the rate based on domestic investment. This Court held that neither promoting domestic business within the state, nor encouraging capital investment in Alabama assets was a legitimate purpose when furthered by discrimination against non-resident competitors.

The New York Court of Appeals, in holding that the State's exclusion of a certain credit from its retaliatory tax calculation only served to generate revenue and did not further a legitimate purpose, effectively stated the relationship between *Western &*

Southern and *Metropolitan Life*:

> *Western & Southern* and [*Metropolitan Life*] together teach us that retaliatory taxation is legitimate precisely because it aims to equalize domestic and foreign taxation. The rule derived from these cases is that a system of retaliatory taxation, which by definition discriminates between domestic and foreign insurance companies, is constitutionally sound insofar as it aims to equalize the tax burden of domestic and foreign insurers[. However,] the imposition of retaliatory tax ***beyond the point of equalization*** solely to generate revenue at the expense of foreign insurers lacks legitimacy.

See United Servs. Auto. Ass'n v. Curiale, 668 N.E.2d 384, 388 (N.Y. 1996) (emphasis added). In other words, under *Western & Southern* and *Metropolitan Life*, this Court recognizes that a point can be reached with a retaliatory taxation system that the State could not reasonably believe its system could contribute to equalizing the tax burdens of domestic and foreign insurers. At that point, the State's statute could no longer be deemed rationally related to the legitimate purposes identified by this Court in *Western & Southern*. And that would necessarily leave the only possible purposes of the statute to be raising revenue or penalizing foreign insurers, neither of which are constitutionally legitimate.

Amici Title Insurers submit that when a statute imposes a retaliatory tax that cannot be rationalized with the principle of equalization, the State has gone too far. And the State's statute no longer passes muster under the Equal Protection Clause. *See American Fire & Cas. Co. v. New Jersey Div. of Taxation*, 912 A.2d 126 (N.J. 2006) (recognizing that

when the Director applied the state's retaliatory tax statute in a manner that essentially produced an extremely low effective premium tax rate, foreign states were unlikely to respond by lowering their tax rates, and thus holding the Director's interpretation would raise significant constitutional questions).

2. The Texas Comptroller's "new math" reinterpretation of the Texas retaliatory tax statute results in an application of the statute that goes too far under this Court's holding in *Western & Southern* and deprives the statute of constitutional legitimacy.

In its assessment of the constitutionality of the Texas Comptroller's "new math," the Texas Supreme Court relied on its conclusion the insurer was not "directly liable" for the tax on that part of the premium allocated administratively to the agent.[2] Amici Title Insurers contend that to whom the State allocates liability for the premium tax is not germane to the constitutional question. It is the premium tax assessed by the State that is the relevant burden for

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[2] Specifically, under the new interpretation of the statute, the tax on the portion of the premium retained by the title insurance agent (85%), though remitted to the Comptroller by the title insurer, is deemed paid by the agent and is excluded from the calculation of the foreign title insurer's retaliatory taxes. *See First American Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008). The Comptroller's proffered justification for its "new math" is that the 85/15 premium split is mandated by Texas law, and the title insurer, though responsible for remitting the agent's portion of the tax to the Comptroller, does not actually pay the agent's portion and cannot be held liable for failure to pay it under the Comptroller's Rules. *See id.* at 633, 635.

determining the retaliatory tax because it is the premium tax burden alone that has the potential of influencing other States' insurance tax policies. Essentially, retaliatory tax systems depend on "apples-to-apples" comparisons, or more correctly, on a common understanding of what it is that is being taxed. The "new math" upheld by the Texas Supreme Court accepts that common understanding of what is being taxed—100% of the premiums collected—but arbitrarily ignores 85% of that base to calculate its retaliatory tax. By this arbitrary exclusion, Texas effectively generates a negligible domestic tax rate. Such a low rate deprives the retaliatory tax equation of its equalization rationale because the Texas Legislature could not reasonably believe it would properly influence other States' insurance tax policies.

The Dissenting Opinion in the Texas Supreme Court aptly illustrated this point:

> Suppose an insurer from a state with a 1% premium tax does business in Texas. On a $1,000 premium, the Comptroller would compare the $2.03 insurer's share of the Texas tax to the $10 premium tax in the other state and assess a $7.97 surcharge. In essence, for purposes of applying the retaliatory tax, the Comptroller has reduced Texas' gross premiums tax rate by 85%, from 1.35% to 0.2025%.

See First American Title Ins. Co. v. Combs, 258 S.W.3d 627, 642-43 (Tex. 2008) (Hecht, J., dissenting). Thus, under the Comptroller's "new math," a foreign insurer could owe retaliatory taxes even if the foreign insurer's home state has a lower premium tax rate than Texas' rate of 1.35%. The Dissenting Opinion's hypothetical hits close to home with the

Amici Title Insurers. For example, Chicago Title, Commonwealth, and Lawyers Title are all domiciled in Nebraska, which has a 1% premium tax rate on 100% of the premiums. Comparing the effective tax rate as explained by the Dissenting Opinion, this will result in a retaliatory tax assessment for these Title Insurers, though Nebraska's 1% tax rate is obviously less than Texas' 1.35% tax rate.

The Majority's response to the Dissent that the foreign insurer would still pay the same total amount of taxes as a Texas insurer operating out-of-state (in the Dissenting Opinion's hypothetical, $10), even if correct, misses the point. By ignoring the taxes assessed on 85% of the premiums, the Texas Comptroller has made it unlikely, if not impossible, that a foreign state would respond to Texas' retaliatory tax statute by lowering its rate to the level necessary to achieve equalization and avoid the retaliatory tax on its insurer. *See id.* at 637.

Regardless of how insurers and agents split premiums and allocate the costs of the business enterprise, the relevant tax burden for purposes of the retaliatory tax statute is the tax on the premium. It is this burden that is taken into account by State lawmakers in determining whether to lower their tax rate in response to another State's retaliatory taxing system. Under the Comptroller's "new math," the effective tax rate on Texas premiums for retaliatory tax purposes is 15% of the current statutory rate of 1.35%, *see* TEX. INS. CODE § 223.003(a), or 0.2025%. Other States could not rationally be expected to lower the tax rate on premiums to this negligible amount, and thus, the Comptroller's reinterpretation of the retaliatory tax statute cannot be said to rationally further the purpose of equalizing the tax burden on

Texas insurers doing business in other States. Rather, the only conceivable purpose furthered by the Comptroller's reinterpretation is the generation of additional revenue or the penalization of foreign insurers—neither of which are legitimate state purposes. *See Metropolitan Life*, 470 U.S. at 877-79; *Western & Southern*, 451 U.S. at 669-70. Under the Comptroller's reinterpretation, Texas has violated the principles of this Court's holding in *Western & Southern* and is applying its statute in a way that does not pass muster under the Equal Protection Clause.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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